SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 87

JULIAN BOND, ET AL., ETC., APPELLANTS,

vs.

JAMES "SLOPPY" FLOYD, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA

(ATLANTA DIVISION)

Civil Action No. 9895

JULIAN BOND, DR. MARTIN LUTHER KING, JR., and MRS. AREL KEYES, for themselves, jointly and severally, and for all others similarly situated, Plaintiffs,

vs.

JAMES "SLOPPY" FLOYD, WILLIAM J. "BILL" LEE, ED T. FULFORD, J. TERRELL WEBB, W. JONES LANE, and DAVID L. NEWTON, individually and as members of the House of Representatives of the State of Georgia and as Representatives of the class of citizens who are presently serving as members of the House of Representatives of the State of Georgia; GEORGE T. SMITH, individually and as Speaker of the House of Representatives of the State of Georgia and as Chairman of the Rules Committee of the House of Representatives of the State of Georgia and as Chairman of the Challenge Committee appointed to consider the seating of Julian Bond; GLENN W. ELLARD, individually and as Clerk of the House of Representatives of the State of Georgia; MADDOX J. HALE, individually and as Speaker Pro-Tem of the House of Representatives of the State of Georgia; ELMORE C. THRASH, individually and as Messenger of the House of Representatives of the State of Georgia; DAVID PEEPLES, individually and as Doorkeeper of the House of Representatives of the State of Georgia; and BEN W. FORTSON, individually and as Secretary of State of the State of Georgia; and JACK TYSON, individually and as Sheriff of the House of Representatives of the State of Georgia, Defendants.

[File endorsement omitted]

[fol. 5]

COMPLAINT—Filed January 13, 1966

(1) This action arises under Article I, Section 10, Article IV, Section 4, the First, Fifth, Sixth, Thirteenth, Fifteenth and Nineteenth Amendments, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the Constitution of the United States and the following provisions of the United States Code; Title 42, §§1981, 1983, 1971(2). Jurisdiction is conferred on this Court by §§1331, 1343(3), 1343(4), 2201 and 2281, of Title 28, United States Code, and §§1983, 1971(2), and 1988 of Title 42, United States Code.

First Cause of Action

(2) The plaintiffs bring this action on their own behalf and on behalf of all other persons similarly situated pursuant to Rule 23(a) (3) of the Federal Rules of Civil Procedure. There are common questions of law and fact affecting the several rights of Negro citizens, male and female, to vote and to have members of their race represent them in the House of Representatives of the State of Georgia. Additional common questions of law and fact exist affecting the several rights of plaintiffs to have Negroes not systematically excluded from legislative representation in the State of Georgia. The members of the class are so numerous as to make it impracticable to bring them all before this Court. A common relief is sought. The interests of said class are adequately represented by plaintiffs.

[fol. 6] (3) Plaintiffs Julian Bond, Dr. Martin Luther King, Jr. and Mrs. Arel Keyes are Negro citizens of Fulton County, Georgia, House District Number 136, are registered voters and are over the age of twenty-one (21) years. Plaintiffs Julian Bond and Dr. Martin Luther King Jr. are men. Plaintiff Arel Keyes is a woman.

(4) The defendants James "Sloppy" Floyd, William J. (Bill) Lee, Ed T. Fulford, J. Terrell Webb, David L. New-

ton, and W. Jones Lane, are white males, over the age of twenty-one, are residents of the State of Georgia, and are duly elected and serving members of the House of Representatives of the State of Georgia. This action is brought against the aforenamed defendants individually and also as representatives of all other members of the House of Representatives of the State of Georgia, they being so numerous as to make it impractical to bring them all before the Court. The questions involved are common questions of law and fact.

The defendant George T. Smith is the duly elected and qualified Speaker of the House of Representatives of Georgia, and is the Chairman of the Rules Committee and also Chairman of the Special Committee created pursuant to House Resolution Number 7 which was appointed for the purpose of holding a hearing on petitions challenging and contesting the seating of Representative-elect Julian Bond of the 136th District ("Challenge Committee").

The defendant Glenn Ellard is the Clerk of the House of Representatives of Georgia.

[fol. 7] The defendant Maddox J. Hale is the Speaker Pro Tem of the House of Representatives of the State of Georgia.

Elmore C. Thrash is the Messenger of the House of Representatives of the State of Georgia.

The defendant David Peeples, is Doorkeeper of the House of Representatives of the State of Georgia.

The defendant Ben W. Fortson is the duly elected and qualified Secretary of State of the State of Georgia and as such is charged with the duty of issuing commissions to members of the House of Representatives of the State of Georgia.

(5) Each of the defendants is a resident of the State of Georgia. Defendant William J. (Bill) Lee resides in Clayton County, Georgia at RFD 1, Forest Park, Georgia. All of the defendants may be served at the State Capitol of the State of Georgia, Atlanta, Georgia.

(6) Plaintiff Julian Bond was on June 16, 1965 duly elected a member of the House of Representatives of the State of Georgia. The election held on that day was pursuant to an order of this Court in the case *Toombs* v. *Fortson* as was the special Democratic Primary election which was held May 5, 1965.

(7) Mr. Bond received the Democratic nomination for office running against one opponent who was also a member of the Negro race. Mr. Bond received 1,243 votes and his opponent, the Rev. Howard Creecy, Sr., received 522 votes. In the special election held on June 16, 1965 Mr. [fol. 8] Bond had Republican opposition. Again his opponent Malcolm J. Dean, was a member of the Negro race. Mr. Bond received 2,320 votes, Mr. Dean receiving 487 votes. Thus Mr. Bond received 82 per cent. of the votes cast in House District Number 136. There are approximately 6,500 registered voters in Mr. Bond's district. Of these approximately 6000 are members of the Negro race. Plaintiffs Dr. Martin Luther King, Jr. and Mrs. Arel Keyes are constituents of Julian Bond. Dr. King's voting residence was transferred to House District 136—which is where he resides—after June 16, 1965. Mrs. Keyes resided in House District 136 and voted in both the primary and general elections held on May 5 and June 16, 1965 and she cast her ballot on each occasion for Mr. Bond. Each of the plaintiffs and all members of their class are presently unrepresented in the House of Representatives of the State of Georgia.

(8) On Thursday, January 6, 1966, the Student Non-Violent Coordinating Committee of which Mr. Bond is a member and an employee issued a statement critical of American policy with respect to Viet Nam and with respect to the civil rights of Negroes in the United States. Mr. Bond stated that he concurred in that statement and he also stated that although he personally would not burn his draft card, he admired the courage of those who took such action knowing of the consequences which they faced. These statements

were widely reported in the Georgia press and, shortly [fol. 9] thereafter, several white members of the House of Representatives of the State of Georgia and other white politicians with strong segregationist beliefs and backgrounds publicly called for the House of Representatives to refuse to seat Mr. Bond.

(9) On Monday, January 10, 1965, the Secretary of State of the State of Georgia transmitted his certification that Mr. Bond was the duly elected Representative from House District 136 to the House of Representatives. Mr. Bond was, however, denied the right to take the oath of office. Five petitions contesting Representative-elect Bond's right to be seated were filed. He was tried under two such petitions, they being attached hereto as Exhibits A and B. The petitions were signed by 75 white members of the House of Representatives of the State of Georgia. Although Rule 198, Rules of the House of Representatives—attached hereto as a part of Exhibit E—requires contestants to retire from the House when the vote is taken on the contest, 74 of the 75 contestants remained and, in fact, voted on House Resolution 19 which deprived Representative-elect Bond of his seat. Although Defendants William J. "Bill" Lee, Ed T. Fulford and J. Terrell Webb signed petitions contesting the right of Representative-elect Bond to be seated, each of them served on the Special Committee, voted in favor of House Resolution 19 in the Committee, returned to the House itself and voted in favor of House Resolution 19.

[fol. 10] (10) A response to the Complaints was filed by Representative-elect Bond and is attached hereto as Exhibit C.

(11) The hearing before the Special Committee was held in the House Chamber and the members of the House themselves remained in their seats throughout the hearing. The proceedings were transcribed by a court reporter and are attached hereto as Exhibit D. As appears from the transcript of the proceedings, Representative-elect Bond was

tried solely for making statements prior to his being seated in and made a member of the House of Representatives of the State of Georgia.

(12) According to Exhibit A, a petition contesting the right of Representative-elect Bond to be seated, Mr. Bond was tried for treason and giving aid and comfort to the enemies of the United States, for violations of Title 50, Sections 462 (a) and 462 (b) United States Code (the Selective Service Act). He was tried under Article III, Section VII, Paragraph I of the Constitution of the State of Georgia which reads as follows:

> "Election, returns, etc.; disorderly conduct. Each House shall be the judge of the election, returns, and qualifications of its members and shall have power to punish them for disorderly behavior, or misconduct, by censure, fine, imprisonment, or expulsion; but no member shall be expelled, except by a vote of two-thirds of the House to which he belongs."

According to Exhibit B, a petition contesting the right of Representative-elect Bond to be seated, Mr. Bond was tried for not being able to take the oath of office required [fol. 11] by Article III, Section VII, Paragraph 1, which reads as follows:

> "I will support the Constitution of this State and of the United States, and on all questions and measures which may come before me, I will so conduct myself, as will, in my judgement, be most conducive to the interest and prosperity of this State."

(13) Defendant George T. Smith has publicly stated that the only method by which Representative-elect Bond could have been seated was to have apologized and come begging for his seat, and that it was doubtful that he could have been seated then.

(14) Plaintiffs and the class they represent aver that Article III, Section 7, paragraph 1 of the Constitution of the State of Georgia of 1945 is on its face unconstitutionally vague and is therefore void for vagueness under the First and Fourteenth Amendments of the Constitution of the United States.

Second Cause of Action

(15) Plaintiffs re-allege paragraphs one through thirteen inclusive in their entirety.

(16) Representative-elect Bond admittedly engaged in no "disorderly behavior or misconduct."

(17) Plaintiffs and the class they represent aver that Article III, Section 7, paragraph 1 of the Constitution of the State of Georgia was unconstitutionally administered against Representative-elect Bond in violation of the First and Fourteenth Amendments of the Constitution of the [fol. 12] United States.

Third Cause of Action

(18) Plaintiffs re-allege paragraphs one through thirteen and sixteen inclusive in their entirety.

(19) Rule 61 of the House of Representatives is on its face unconstitutionally vague and is therefore void for vagueness under the First and Fourteenth Amendments of the Constitution of the United States.

Fourth Cause of Action

(20) Plaintiffs re-allege paragraphs one through thirteen and sixteen inclusive in their entirety.

(21) Rule 61 of the House of Representatives was unconstitutionally administered against Representative-elect Bond in violation of the First and Fourteenth Amendments of the Constitution of the United States.

Fifth Cause of Action

(22) Plaintiffs re-allege paragraphs one through thirteen and sixteen inclusive in their entirety.

(23) House Resolution 19 is unconstitutional in its application to Representative-elect Bond in that it deprived him of rights guaranteed by the First and Fourteenth Amendments of the Constitution of the United States and it injured the class of plaintiffs here represented by depriving them of their right to representation in the House [fol. 13] of Representatives in violation of the Equal Protection Clause of the Fourteenth Amendment and the Fifteenth and Nineteenth Amendments of the Constitution of the United States.

Sixth Cause of Action

(24) Plaintiffs re-allege paragraphs one through thirteen and sixteen inclusive in their entirety.

(25) The oath of office required by Article III, Section IV, paragraph 5 is unconstitutionally vague and therefore void under the First and Fourteenth Amendments of the Constitution of the United States in that said oath requires a person to "so conduct himself" as will "in his" judgement, be most conducive to the interest and prosperity of this State" and, Representative-elect Bond stated that he was and is ready, willing and able to take the oath yet was denied his seat there.

[fol. 14] Seventh Cause of Action

(26) Plaintiffs re-allege paragraphs one through thirteen and sixteen inclusive in their entirety.

(27) The defendants' refusal to seat the plaintiff Julian Bond denies to the plaintiffs and the class they represent a Republican form of government, as guaranteed them by Article IV, Section 4 of the Constitution of the United States, since the 136th District is, and the voters therein

are, and must remain, unrepresented in the 1966 General Assembly.

Eighth Cause of Action

(28) Plaintiffs re-allege paragraphs one through thirteen inclusive in their entirety.

(29) House Resolution 19 refusing to seat the plaintiff Julian Bond is a bill of attainder in violation of the provisions of Article I, Section 10 of the Constitution of the United States, since it imposes punishment (deprivation of office) upon a named individual by legislative act. Further, since Bond was punished for an action taken by him at a time when it was proscribed by no law, House Rule 19 was an ex post facto law.

[fol. 15] Ninth Cause of Action

(30) Plaintiffs re-allege paragraphs one through thirteen and sixteen inclusive in their entirety.

(31) The whole proceeding (see especially pages 59 and 82 of the Transcript) amounted to a trial for infamous crimes without presentment or indictment by a Grand Jury, as guaranteed by the Fifth Amendment to the Constitution of the United States.

Tenth Cause of Action

(32) Plaintiffs re-allege paragraphs one through thirteen and sixteen inclusive in their entirety.

(33) The whole proceeding (see especially pages 59 and 82 of the transcript) amounted to a denial of trial by an impartial jury as guaranteed by the Sixth Amendment to the Constitution of the United States, both because there was no jury, no right to compulsory process and because the plaintiff Bond's accusers were also his judges.

Eleventh Cause of Action

(34) Plaintiffs re-allege paragraphs one through thirteen and sixteen inclusive in their entirety.

(35) The defendants' denial of the plaintiff Bond's seat pursuant to House Resolution 19 to the extent that it was because of his connection with and support of a policy of [fol. 16] a militant civil rights organization of which he was a member denied the said plaintiff the right of free assembly as guaranteed to him by the First Amendment to the Constitution of the United States and the privileges and immunities clause of the Fourteenth Amendment to the Constitution of the United States.

Twelfth Cause of Action

(36) Plaintiffs re-allege paragraphs one through 13 and sixteen inclusive in their entirety.

(37) The enactment by the defendants of House Rule 19 without evidence denies to the plaintiffs the protection of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Thirteenth Cause of Action

(38) Plaintiffs re-allege paragraphs one through thirteen and sixteen inclusive in their entirety.

(39) The defendants' enactment of House Rule 19 without legal cause therefor denies to the plaintiff Mrs. Arel Keyes her right to vote as guaranteed to her by the Nineteenth Amendment to the Constitution of the United States.

[fol. 17] (40) Plaintiffs further show that this is a proceeding wherein they seek a declaration of their rights pursuant to ¶ 2201 of Title 28, United States Code, in that the defendants, their officers, agents, servants, employees, or attorneys and those persons in active concert or participation with them, by refusing to seat Julian Bond in the

House of Representatives, to have the oath administered to him, to be allowed to fully participate in the processes of the House of Representatives on the grounds of his exercise of free speech rights, are violating Article I, Section 10, Article IV, Section 4, the First, Fifth, Sixth, Thirteenth, Fifteenth and Nineteenth Amendments, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the Constitution of the United States.

(41) There is between the parties an actual controversy as herein set forth. The plaintiffs and others similarly situated and affected on whose behalf this suit is brought, are suffering irreparable injury and are threatened with irreparable injury in the future by reason of the acts herein complained of; they have no plain adequate or complete remedy to redress the wrongs and unlawful acts herein complained of, other than this action for a declaration of rights and an injunction; the amount of their damage is in excess of Ten Thousand Dollars; any other remedy to which plaintiffs and those similarly situated could be remitted would [fol. 18] be attended by such uncertainties and delays as to deny substantial relief, would involve multiplicity of suits, cause further irreparable injury, damage and inconvenience to the plaintiffs and those similarly situated.

Wherefore, Premises Considered, on all causes of action, separately and severally, plaintiffs respectfully pray that this Court take jurisdiction of this case, that a special three-judge court be called to hear and determine this case as by law provided in 28 United States Code, ¶2281 et seq., that it issue a temporary restraining order or a preliminary injunction to be made permanent later against all named defendants, their officers, agents, servants, employees, or attorneys and those persons in active concert or participation with them; and plaintiffs further pray that the Court advance this case on the docket and order a speedy hearing thereof and upon such hearing adjudge, decree and declare the rights and legal relations of the parties hereto in order

that such declaration shall have the force and effect of a final judgment or decree; and plaintiffs further pray that the Court enter a judgment or decree declaring the practice, policy, custom, or usage of the defendants, their officers, agents, servants, employees or attorneys and those persons in active concert or participation with them, in excluding Julian Bond from membership in the House of Representatives of the State of Georgia and any and all of the [fol. 19] rights and privileges appertaining thereto, to be in violation of the laws and Constitution of the United States.

Plaintiffs further pray that the defendants, their agents, officers, servants, employees or attorneys and those persons in active concert or participation with them, be temporarily and permanently enjoined from excluding Julian Bond from membership in the House of Representatives of the State of Georgia and any and all of the rights and privileges appertaining thereto.

Plaintiffs further pray that this Court adjudge and declare Article III, Section IV and VII, Paragraphs III and V of the Constitution of the State of Georgia of 1945 and Rule 61 of the Rules of the House of Representatives of the State of Georgia and House Resolution 19 null and void on the grounds of their facial unconstitutionality and on the grounds of their application to Plaintiffs and the class they represent and the plaintiffs further pray that they have a preliminary and permanent injunction, enjoining the operation, enforcement, and execution of Article III, Sections VII and IV, Paragraphs III and V of the Constitution of the State of Georgia of 1945 and Rule 61 of the Rules of the House of Representatives of the State of Georgia and House Resolution 19 on the grounds of their facial uncon- [fol. 20] stitutionality and on the grounds of their application to Plaintiffs and the class they represent.

Respectfully submitted,

Howard Moore, Jr., 859½ Hunter St., NW, Atlanta, Georgia; Morris Brown, Healey Building, Atlanta, Georgia.

Of counsel:

Charles Morgan, Jr., 5 Forsyth Street, Atlanta, Georgia; Melvin L. Wulf, 156 Fifth Avenue, New York, New York.

[fol. 21] *Duly sworn to by Julian Bond, jurat omitted in printing.*

[fol. 22]

Exhibit A to Complaint

Petition

To: The Presiding Officer, House of Representatives, State of Georgia

Comes now the undersigned and respectfully show the following:

Count I

The Student Nonviolent Coordinating Committee, an organization and association of which Representative-Elect Julian Bond is a member, agent, and publicity director, has caused to be made certain statements concerning the position of the United States in the Viet Nam conflict, a copy thereof being attached hereto, marked Exhibit A and by reference made a part hereof, and the said Representative-Elect Julian Bond did publicly endorse, approve and confirm said statement.

Count II

Said representative-elect has said that he admires the courage of those persons who burn their draft cards.

1.

The actions and statements of said representative-elect show that he does not and will not support the Constitution of the United States and of the State of Georgia, as required by law (Constitution of Georgia, Article III, Section IV, Paragraph V (Code §2-1605)); Constitution of the United States, Article VI, Section 3.

2.

By said actions and statements, said representative-elect adheres to the enemies of the United States and of the State of Georgia, contrary to the Constitution of Georgia (Article I, Section II, Paragraph II) and of the United States (Article III, Section 3, Cl. 1).

3.

By said actions and statements, said representative-elect gives aid and comfort to the enemies of the United States and of the State of Georgia, contrary to the Constitution of Georgia (Article I, Section II, Paragraph II) and of the United States (Article III, Section 3, Cl. 1).

[fol. 23]

4.

Said actions and statements constitute a violation of the United States Code, Title 50, §462(a).

5.

Said actions and statements constitute a violation of the United States Code, Title 50, §462(b), as amended.

6.

The statements referred to above are reprehensible and are such as tend to bring discredit to and disrepect of the House of Representatives and constitute actions on the part of Representative-Elect Julian Bond sufficient to pre-

vent him from being seated as a member of the House of Representatives.

7.

Such actions and statements show that he is unqualified and ineligible to be a member of the House of Representatives.

8.

Article III, Section VII, Paragraph I of the Constitution of the State of Georgia reads as follows:

> "Election, returns, etc.; disorderly conduct. Each House shall be the judge of the election, returns, and qualifications of its members and shall have power to punish them for disorderly behavior, or misconduct, by censure, fine, imprisonment, or expulsion; but no member shall be expelled, except by a vote of two-thirds of the House to which he belongs."

Now, therefore, the undersigned petitioners challenge the right of Representative-Elect Julian Bond to be seated as a member of the House of Representatives and respectfully request that he not be allowed to take the oath of office as a member of the House of Representatives and that he not be seated as a member of the House of Representatives.

This 10th day of January, 1966.

* * * * * * *

[fol. 24] EXHIBIT A TO EXHIBIT A

The Student Nonviolent Coordinating Committee has a right and a responsibility to dissent with United States foreign policy on an issue when it sees fit. The Student Nonviolent Coordinating Committee now states its opposition to United States' involvement in Viet Nam on these grounds:

We believe the United States government has been deceptive in its claims of concern for freedom of the Vietnamese people, just as the government has been deceptive in claiming concern for the freedom of colored people in such other countries as the Dominican Republic, the Congo, South Africa, Rhodesia and in the United States itself.

We, the Student Nonviolent Coordinating Committee, have been involved in the black people's struggle for liberation and self-determination in this country for the past five years. Our work, particularly in the South, has taught us that the United States government has never guaranteed the freedom of oppressed citizens, and is not yet truly determined to end the rule of terror and oppression within its own borders.

We ourselves have often been victims of violence and confinement executed by United States government officials. We recall the numerous persons who have been murdered in the South because of their efforts to secure their civil and human rights, and whose murderers have been allowed to escape penalty for their crimes.

The murder of Samuel Young in Tuskegee, Ala., is no different than the murder of peasants in Viet Nam, for both Young and the Vietnamese sought, and are seeking, to secure the rights guaranteed them by law. In each case, the United States government bears a great part of the responsibility for these deaths.

Samuel Young was murdered because United States law is not being enforced. Vietnamese are murdered because the United States is pursuing an aggressive policy in violation of international law. The United States is no repecter of persons or law when such persons or laws run counter to its needs and desires.

We recall the indifference, suspicion and outright hostility with which our reports of violence have been met in the past by government officials.

[fol. 25] We know that for the most part, elections in this country, in the North as well as the South, are not free. We have seen that the 1965 Voting Rights Act and the 1964 Civil Rights Act have not yet been implemented with full federal power and sincerity.

We question, then, the ability and even the desire of the United States government to guarantee free elections abroad. We maintain that our country's cry of "preserve freedom in the world" is a hypocritical mask behind which it squashes liberation movements which are not bound, and refuse to be bound, by the expediencies of United States cold war policies.

We are in sympathy with, and support, the men in this country who are unwilling to respond to a military draft which would compel them to contribute their lives to United States aggression in Viet Nam in the name of the "freedom" we find so false in this country.

We recoil with horror at the inconsistency of a supposedly "free" society where responsibility to lend oneself to military aggression. We take note of the fact that 60 per cent of the draftees from this country are Negroes called on to stifle the liberation of Viet Nam, to preserve a "democracy" which does not exist for them at home.

We ask, where is the draft for the freedom fight in the United States?

We therefore encourage those Americans who prefer to use their energy in building democratic forms within this country. We believe that work in the civil rights movement and with other human relations organizations is a valid alternative to the draft. We urge all Americans to seek this alternative, knowing full well that it may cost them lives—as painfully as in Viet Nam.

[fol. 26] EXHIBIT B TO COMPLAINT

CHALLENGE AND CONTEST TO THE SEATING AND SWEARING IN OF REPRESENTATIVE-ELECT JULIAN BOND OF THE 136th REPRESENTATIVE DISTRICT OF FULTON COUNTY, GEORGIA

TO THE HONORABLE GLEN ELLARD, CLERK OF THE HOUSE OF REPRESENTATIVES OF GEORGIA, AND TO THE HONORABLE GEORGE T. SMITH, SPEAKER OF THE HOUSE OF REPRESENTATIVES OF GEORGIA, AS SPEAKER, AND AS THE HOLDER OF THAT OFFICE UNTIL HIS SUCCESSOR IS ELECTED AND QUALIFIED:

We, the undersigned, duly and properly elected Members of the Georgia House of Representatives, do hereby challenge, contest, and object to one Julian Bond taking the oath as set forth in the Georgia Constitution, Article III, Section IV, Paragraph 5, as the Representative of the 136th Representative District of Fulton County in the Georgia House of Representatives, for the following reasons, to-wit:

(1) That the Constitution of Georgia, Article III, Section VII, Paragraph 1 provides that each House shall be the judge of the election, returns, and qualifications of its members.

(2) That the Constitution of Georgia, Article III, Section IV, Paragraph 5, specifically requires each senator and representative, before taking their seat, to take the following oath or affirmation, to-wit:

> "I will support the Constitution of this State and of the United States, and on all questions and measures which may come before me, I will so conduct myself, as will, in my judgement, be most conducive to the interest and prosperity of this State."

(3) That the said Julian Bond has specifically and publicly endorsed in full a policy statement of an organization known as the Student Non-Violent Coordinating Committee, which statement reads as follows:

"We are in sympathy with, and support, the men in this country who are unwilling to respond to a military draft which would compel them to contribute their lives to United States aggression in Viet Nam in the name of the 'freedom' we find so false in this country. [fol. 27] "We recoil with horror at the inconsistency of a supposedly free society where responsibility to freedom is equated with the responsibility to lend oneself to military aggression. We take note of the fact that 16 percent of the draftees from this country are Negroes called on to stifle the liberation of Viet Nam, to reserve a 'democracy' which does not exist for them at home. . . .

"We, therefore, encourage those Americans who prefer to use their energy in building democratic forms within this country. We believe that work in the civil rights movement and with other human relations organizations is a valid alternative to the draft. We urge all Americans to seek this alternative, knowing full well that it may cost them their lives—as painfully as in Viet Nam."

(4) That the said Julian Bond is not qualified under the Constitution of Georgia to take the oath as a Member of the House of Representatives representing the 136th Representative District of Fulton County, Georgia, inasmuch as his full endorsement of the aforesaid policy statement of the Student Non-Violent Coordinating Committee is totally and completely repugnant to and inconsistent with the mandatory oath prescribed by the Constitution of Georgia for a Member of the House of Representatives to take before taking his seat.

(5) That the said Julian Bond cannot justly and honestly take the aforementioned mandatory constitutional oath which requires him to uphold the Constitution of the United States and the Constitution of Georgia, having endorsed the aforesaid subversive policy statement.

(6) That many of the undersigned elected Members of the House of Representatives of the State of Georgia are

continuing members, having been duly and properly elected to the House of Representatives prior to the reapportionment of said body, and having previously taken the oath required by law.

WHEREFORE, the undersigned do demand, request, and move that:

(a) The said Clerk of the House, the Honorable Glenn Ellard, upon organizing the said House of Representatives [fol. 28] as prescribed by the Constitution, do refuse to allow or permit the said Julian Bond from taking the oath as a Member of the House of Representatives of the State of Georgia, and from taking his seat until such time as the House becomes properly organized, and the matter in controversy be voted on by the House, or that the challenge and contest of the seating and taking of oath by the said Julian Bond be referred by the Speaker to an appropriate Committee of the House for a full hearing and investigation thereof and that said Committee findings be reported back to the House in writing, so that the House shall act thereon.

(b) That the Honorable George T. Smith, the Acting and subsisting Speaker of the House of Representatives, as a hold-over in that office until his successor is duly elected and qualified, and his successor, fail and refuse to allow said Julian Bond to take the oath prescribed by law or become seated as a Member of the Georgia House of Representatives until said House of Representatives have an opportunity to vote on the qualifications of said Julian Bond, or until the challenge and contest of qualifications of said Julian Bond be referred to an appropriate Committee of the House to hear and inquire into this challenge and said qualifications, and report its findings back in writing to the House, for said House to act thereon.

This Challenge and Contest filed and entered at 10:00 A.M., this the 10th day of January in the Year of OUR LORD NINETEEN HUNDRED AND SIXTY-SIX.

. . . . . .

[fol. 32] EXHIBIT C TO COMPLAINT

IN THE MATTER OF:

REPRESENTATIVE-ELECT JULIAN BOND, Respondent.

Response to challenges, contests and petitions filed in the House of Representatives, State of Georgia, on January 10, 1966.

1.

Respondent, Julian Bond, has in no way engaged in treason as is charged against him. In fact, he is a patriotic, dedicated and loyal American citizen. On November 26, 1965, President Lyndon Baines Johnson, through his Press Secretary, Bill D. Moyers, said Americans have a basic right to criticize America's policies abroad. This statement was made in reference to demonstrations against the war in Viet Nam. Julian Bond and all other representatives of the people of the United States have a positive duty to speak on all public questions and issues. Just as members of the United States House of Representatives and the United States Senate have criticized both the fact that we are in Viet Nam and the conduct of the war there, Julian Bond insists on his equal right of free expression.

2.

Respondent alleges that action to refuse to seat him or to seat him with censure is an effort as appears from the challenges, contests and petitions filed against him to deprive him of his right of free speech and free expression and of his rights of freedom of petition under the First Amendment of the Constitution of the United States and the equal protection and due process clauses of the Fourteenth Amendment of the Constitution of the United States and of the Constitution and laws of the State of Georgia of 1945 (Code Section 2-115).

3.

Respondent avers that the action proposed to be taken against him is based upon his membership in and employment by the Student Nonviolent Coordinating Committee, in violation of his rights of free assembly and association, as guaranteed by the First and Fourteenth Amendments of the Constitution of the United States.

4.

Respondent is charged with violation of the criminal laws of the United States and criminal laws of the State [fol. 33] of Georgia and is, in effect, being subjected to a trial by a special committee of the House of Representatives, State of Georgia, and a trial by the House of Representatives, State of Georgia, for alleged violations of criminal laws and is thereby being deprived of the right to be proceeded against by indictment, as guaranteed by the Fifth Amendment, his right to a trial by jury as guaranteed by the Sixth Amendment and the rights of equal protection and due process of laws as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

5.

Respondent has in these proceedings no right to compulsory process for obtaining witnesses in his favor as is guaranteed him by the Sixth and Seventh Amendments of the Constitution of the United States and of the equal protection and due process clauses of the Fourteenth Amendment of the Constitution of the United States.

6.

Respondent has not engaged in disorderly behavior, disorderly conduct or misconduct and action taken against him in the total absence of proof is in violation of the due process of the Fourteenth Amendment of the Constitution of the United States.

7.

Respondent is willing to take the oath of affirmation required of members of the House of Representatives, State of Georgia, and is a resident citizen of the State of Georgia, House District 136, from which he was duly elected by the electors therein on June 16, 1965. The House of Representatives, State of Georgia, met at 10:00 a.m. and received a communication from the Secretary of State of Georgia transmitting and certifying the name of Julian Bond as the duly qualified representative of House District No. 136.

8.

Respondent has been deprived of his right to vote in the organization of the House of Representatives, State of Georgia, the organization of said House being thereby rendered invalid and said House's further acts will be void and of no effect under the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States and the Fifteenth Amendment of the Constitution of the United States in that petitioner and those he represents have been deprived of their right to vote.

9.

The House of Representatives of the State of Georgia was ordered reapportioned in the Case of *Toombs* v. *Fort-*
[fol. 34] *son,* House District No. 136 having been created thereby. To deprive Respondent of his seat in the House of Representatives, State of Georgia, thereby deprives the voters of House District 136 of representation in the House of Representatives, State of Georgia, in violation of the order of the Court in *Toombs* v. *Fortson* and in violation of the equal protection and due process clauses of the Fourteenth Amendment of the Constitution of the United States and the Fifteenth Amendment of the Constitution of the United States.

10.

All these challenges, contests and petitions were unsworn and in no way verified.

11.

The Respondent objects to the procedures of the special committee of the House of Representatives, State of Georgia, and of the House of Representatives, State of Georgia, in that a simple majority vote rather than a two-thirds vote is to be employed to determine his qualifications and eligibility to serve as a member of the House of Representatives, State of Georgia, in violation of due process clauses of the Fourteenth Amendment of the Constitution of the United States, and in violation of Title 2, Georgia Code Annotated, Section 1901 of the Constitution of the State of Georgia of 1945.

12.

The challenges, contests and petitions against Representative-Elect Julian Bond, Respondent, are racially based and racially motivated, or based upon Respondent's associations and statements regarding racial matters, and are thereby in violation of the First Amendment of the Constitution of the United States, the Thirteenth Amendment of the Constitution of the United States, the Fourteenth Amendment of the Constitution of the United States and the equal protection and due process clauses thereof and the Fifteenth Amendment of the Constitution of the United States.

13.

That the honorable Glenn Ellard, Clerk of the House of Representatives of the State of Georgia, as ex-officio Presiding Officer of said House, had no authority at law or under the rules of the House to demand, instruct or request Representative-Elect Julian Bond to stand aside and not

take the oath required by law or members of the House of Representative, State of Georgia. Said Clerk's authority under law and by rule is limited solely to organizational matters and not to issues relating to elections, returns and qualifications for members.

[fol. 35] 14.

That at the time each of said challenges, contests and petitions were filed and lodged with the House of Representatives, State of Georgia, none of the persons signing said pleadings were then duly constituted members of the House of Representatives, and thus were without authority or capacity at said time and place to file or make challenge of Respondent's eligibility and qualification to take his oath of office.

WHEREFORE, premises considered, Respondent hereby respectfully requests that all challenges, contests and petitions be dismissed, quashed and that the special committee of the House of Representatives, State of Georgia and the House of Representatives of the State of Georgia take all actions and steps necessary to have the oath administered to him and have him seated as the duly elected representative of House District 136 of the State of Georgia.

This 10th day of January, 1966.

/s/ HOWARD MOORE, JR.
/s/ CHARLES MORGAN, JR.
For the Respondent

[fol. 37] EXHIBIT E TO COMPLAINT

Rule 61. Each House shall be the judge of the election, returns, and qualifications of its members and shall have power to punish them for disorderly behavior, or misconduct, by censure, fine, imprisonment, or expulsion; but no

member shall be expelled, except by a vote of two-thirds of the House to which he belongs.

(Ga. Const., art. III, sec. VII, par. I.)

* * * * * * *

[fol. 38] EXHIBIT F TO COMPLAINT

H.R. No. 19

By Messrs. Smith of the 90th and Wiggins of the 32nd

A RESOLUTION

Relative to the matter of the seating of Representative-Elect Julian Bond; and for other purposes.

WHEREAS, a special committee created pursuant to H.R. No. 7 which was appointed for the purpose of holding a hearing on petitions challenging and contesting the seating of Representative-Elect Julian Bond of the 136th District has conducted a hearing in said matter; and

WHEREAS, said committtee has submitted a report in which it is recommended that Representative-Elect Julian Bond not be allowed to take the oath of office as a Representative of the House of Representatives and that he not be seated as a member of the House of Representatives.

NOW, THEREFORE, BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES that the report of the aforesaid committee is hereby adopted and the recommendations contained therein shall be followed.

BE IT FURTHER RESOLVED that Representative-Elect Julian Bond shall not be allowed to take the oath of office as a member of the House of Representatives and that Representative-Elect Julian Bond shall not be seated as a mem-
[fol. 39] ber of the House of Representatives.

BE IT FURTHER RESOLVED that the Clerk of the House is hereby instructed to immediately transmit a copy of the

aforesaid report and a copy of this resolution to the Governor, to the Secretary of State and to Representative-Elect Julian Bond.

In House

Read and Adopted January 10, 1966

[fol. 41]

Exhibit H to Complaint

Text of Request Made for Adjournment

January 12, 1966

Hon. Carl Sanders, Governor of the State of Georgia

Hon. Peter Zack Geer, Lt. Governor of the State of Georgia

Hon. George T. Smith, Speaker of the House of Representatives

Gentlemen:

We hereby call upon you to take all steps necessary to adjourn The House of Representatives of the State of Georgia until such time as the people of the 136th House District have a Representative there. The House of Representatives should not be reconvened until a special election has been held. Otherwise, 6500 voters—including a Nobel Peace Prize winner—will be deprived of their right to representation in the Georgia House of Representatives.

We call to your attention Article III, paragraph 3, Constitution of the State of Georgia, 1945, which provides for an adjournment by majority vote of the members of the House of Representatives and the Senate.

This request is made on behalf of Julian Bond.

Howard Moore
Charles Morgan, Jr.
Morris Brown

[fol. 64]

EXHIBIT D TO COMPLAINT

BEFORE THE SPECIAL COMMITTEE OF THE HOUSE OF REPRESENTATIVES

9895

In the Matter of:

JULIAN BOND, Respondent.

Transcript of the proceedings heard before the Special Committee of The House of Representatives, THE HONORABLE GEORGE T. SMITH, Chairman, in the House Chambers, State Capitol Building, Atlanta, Georgia, commencing at 2:30 o'clock p.m., January 10, 1966.

[Stamp]
FILED IN CLERK'S OFFICE
JANUARY 13 1966
CLAUDE L. GOZA, Clerk
By /s/ S. J. TIDWELL, Deputy Clerk

• • • • • • •

[fol. 68] PROCEEDINGS

The Chairman: Ladies and Gentlemen, this is an open hearing to everybody as long as it stays orderly. If it gets disorderly, too much noise or anything takes place out of the ordinary, the House Chamber will be cleared of everybody except the Committee and the news media.

If there is anyone in the press box that does not have a valid press pass to the press box, he will be asked to vacate the press box in order that those who do have valid passes to the press box can have a seat. I will let the press take care of that from here on out, unless they get in a fight.

The Committee, the Special Committee that is hearing this protest, if you have not moved down to the front,

please do so. I would ask the members that have seats down on the front, particularly in the front on the right and left immediately in the front and to the right here, to please vacate your seats and let some member of the Special Committee hearing this sit there, because we want them close, when this can be done.

I am going to request that no photographers, newsmen or tv-men be on the floor unless they are in the bullpens, one of the two down here on the left. Please do not come out of any of those places to take pictures, or otherwise converse with anybody in the assembly until the hearing is over with, please.

[fol. 69] (Whereupon, there was a short pause.)

The Chairman: Ready, Mr. Morgan? Ready, Mr. Groover?

The House will come to order.

This Committee is about to begin the hearing, and I wish to repeat again: Let's have no demonstrations, no outbursts. We must have order, and at any instant there is any disorder, the gallery in this House will be cleared and nobody will be allowed in this hearing but the press, the news media, the Committee, and the parties at interest.

To start off with, the burden is on the Protestant to prove the allegations of his petition. Secondly, in the Committee, the protestor will have the opening and conclusion, and in the Committee, there will be a limit of 30 minutes to each side in the opening and conclusion.

The Chair recognizes the gentleman from Richmond, Mr. Hull.

Rep. Hull: Mr. Speaker, I didn't ask to sit on this Committee. This, to me, is a very important function we have to perform, and I would like to ask if the Speaker has considered Rule 62, because it is my opinion if we have a written statement as to exactly what Mr. Bond did say, and what his intentions were behind his saying it—

The Chairman: Has each member of the Committee been handed a copy of the petition yet?

[fol. 70] Rep. Wiggins: Yes.

Rep. Hull: The petition, yes, but as an individual member serving on this very important committee, I would like to ask Mr. Bond, his counsel, or however you get the proper inquiry, as to whether he would have any objection to putting in affidavit form, under oath, as to what he did actually say, and his intentions behind his statement.

The Chairman: I think that would be a proper question after both sides have presented their cause. And any committee member wishing to make any request or questions of Mr. Bond, I will allow that at that time, but at this time, I think your question is out of order.

Rep. Hull: Can I ask one other thing? Is it in order, Mr. Chairman, that Rule 62 be read by the Clerk or the Secretary of the Committee?

The Chairman: The only trouble is that Mr. Bond is not a member of the House of Representatives yet.

Rep. Hull: Are you ruling me out of order?

The Chairman: No, I am just saying that Mr. Bond is not a member of the House of Representatives. That rule applies only to members of the House of Representatives, and he is not a member yet.

Rep. Hull: Isn't the very subject matter of what we are trying to decide through this committee the substance of what Mr. Bond said, and the intentions behind what he said?

[fol. 71] The Chairman: That's right, but it was said before he was a member of this House of Representatives; therefore, this rule would not apply to him because he is not a member of the House of Representatives.

Rep. Hull: Mr. Chairman, I hate to belabor this, and I know everybody has been waiting, but as a member of the Committee, I would like to ask if it would be proper to inquire of Mr. Bond's counsel as to whether he would have an objection to putting in affidavit form what he did say and his intentions behind the statement.

The Chairman: This time, I am going to rule that request out of order, because at the proper time in this proceeding, you will get a chance to ask that very question, and perhaps without even having to ask it.

At this time, does every member of the Committee have a copy of the proceedings?

First, I want to ask the Clerk or the Secretary of the Committee to call the roll of the Committee to see how many members of the Committee are here and who is absent.

• • • • • • •

[fol. 73] Rep. Wiggins: Mr. Chairman, all the members are present.

[fol. 74] The Chairman: Thank you.

Now, it has been agreed between the parties that Exhibit A and Exhibit B of Petition A and Petition B, which will be the ones that the cause will be heard upon.

A Member: Mr. Chairman?

The Chairman: Yes, sir.

A Member: I don't think that the members of the Committee have had theirs lettered A, B, C, D, and E, and I think it is going to be necessary.

The Chairman: Look at the top of one marked, "Petition to the Presiding Officer of the House of Representatives, State of Georgia, Comes now the undersigned and respectfully shows the following," and you have got Count One and Count Two. That is Petition A, and it has an Exhibit A on it.

And then Petition B is "Challenge and contest of the seating and swearing in of Representative-Elect Julian Bond of the 136th Representative District of Fulton County, Georgia. That is Petition B.

Now, those are the two that the cause will be heard upon. Now, there are three other petitions, Petition C, Petition D, and Petition E, which are being withdrawn and will not be heard upon, and a copy of them will be given to the Court Reporter to be made a part of the record of the case.

Someone hand these to the Court Reporter, please.

[fol. 75] Mr. Groover, you may proceed.

Mr. Groover: Mr. Speaker, Mr. Chairman, Gentlemen of the House, I appear here on behalf, as counsel on behalf

of Mr. Jones Lane and the other members signing the two petitions, which are presented to you as the Petitions A and Petition B, in which, in summary, it is charged that the Respondent, Mr. Bond, should not be seated in the House of Representatives because of statements made by him which reflect upon his ability to take the oath required by the Constitution of the State of Georgia.

Outlined in the petitions are the statements which are referred to, and the statements which it contends demonstrate that he is not able to subscribe to the oath required by the Constitution, which reads as follows:

> "I will support the Constitution of this State, and of the United States, and on all questions and measures which may come before me, I will so conduct myself as will in my judgment be most conducive to the interest and prosperity of this State."

Now, Mr. Speaker, with that brief outline, Mr. Chairman, with that brief outline, I would like to call, for the purpose of cross-examination, the applicant for membership in the House, Mr. Julian Bond.

The Chairman: Mr. Groover, I am going to allow the Respondent to outline his case briefly, and then you can call [fol. 76] him.

Mr. Moore, Mr. Howard Moore, one of the attorneys for the Respondent; Mr. Charles Morgan is the other one.

Mr. Moore: Mr. Speaker and Members of the Rules Committee, Special Committee, I represent Julian Bond, a citizen of the United States, a citizen of Georgia, resident of Fulton County.

I represent Julian Bond, who was elected by an overwhelming majority of the voters in his district on June 16th, 1965. The Secretary of State has made his return certifying that Mr. Bond is a duly elected representative from the 136th District.

The matter that is before you does not relate to any issue of his qualifications as to citizenship, or as to his being a bona fide candidate and elected Representative; and no

issue is before you as to propriety or legality of the election. The issues which relate, and which are before you deal exclusively with and solely with his right as a citizen, a private citizen to endorse a statement and to express his views on the policy of the United States' Administration of President Johnson, now in office, relating to the conduct and propriety of the war in Viet Nam.

It so happens that Mr. Bond's views on this particular issue are different, perhaps, than the views of many people in the State of Georgia and certainly throughout the [fol. 77] United States. At least, that seems to be the common understanding, and there are no other issues in this petition, or that will be heard before you this afternoon, except the issues relating to Mr. Bond's right to make a statement, his right of dissent.

It seems that the important inquiry is going to be, what did he say, and what was his intention behind saying it. Our viewpoint is that it is an irrelevant matter, that he had the right to make such statement, but you gentlemen here insist, or some gentlemen, Members of this House of Representatives, insist that you have a right to inquire into that matter.

We feel that when you make that inquiry, you will find that Mr. Bond has no un-American attitude, that he has an attitude that is consistent with the traditions, the finest traditions of free speech and dissent in this Country and in England, from which we got most of our common law.

We contend in our response, which you have been given a copy of, Mr. Bond has not engaged in any treasonable activities. As a matter of fact, we contend that his position is consistent with that of the President of the United States. You have our petition and our allegations that we made before you. We also contend that the effort to censure him—

Rep. Hull: Mr. Speaker—

The Speaker: I am not going to let the gentleman be interrupted while he makes out his case, so let him go on and make out his case.

[fol. 78] Mr. Moore: We contend further that these proceedings punish him and harass him, in violation of his right to free speech, to exercise his free speech. We further contend that he is being prosecuted and accused of guilt by association because of his employment, the persons for whom he works.

We contend that there is no evidence of any un-American activities on the part of Mr. Bond. We contend that he has not violated any Federal or State Laws pertinent to this investigation. We contend further that he is being denied elementary due process. He does not have the right of compulsory process to bring in witnesses to testify on his behalf, to produce documents that may exculpate him.

We contend that he has engaged in no disorderly conduct that has brought disrepute and ill reputation to the House of Representatives of the State of Georgia.

We further contend that he is willing to take the oath of affirmation to uphold the Constitution of the United States and the Constitution of the State of Georgia; the very same oath that most of you, all of you took this morning. He was here, ready, willing and able to take that oath, but he was denied that right.

We further contend that the action of the Clerk of the House of Representatives, the ex-officio presiding officer, Mr. Ellard, was unauthorized by the laws of Georgia, in that the ex-officio presiding officer only has authority re-[fol. 79] lating to matters of organization, not any authority to ask a member to stand aside so that his oath cannot be administered, because that is a matter which relates to the composition of the house.

These are substantially what our contentions are. There are some matters in there that deal with the Federal court case which has resulted in the reapportionment of the House of Representatives and under which this present session is being held, and under which a mandate exists with respect to this present session. We think that this is the worst sort of witch hunt, or the worst sort of inquiry; and we pray that, in legal terms, that after full investiga-

tion has been made of this matter here this afternoon, that you will seat Mr. Bond and that you will repudiate and renounce the people who have insulted the dignity of the House of Representatives by causing, putting the House of Representatives in a position where this type of investigation has to be made.

We respectfully submit that Mr. Bond is entitled to his seat, that you are obligated to find that he is entitled to his seat, and that your only American duty consistent with your oath which you took this morning will be to seat him, that any other verdict contrary to that would be a verdict that is un-American indeed, and certainly unbecoming to the House of Representatives of the State of Georgia.

The Chairman: Are there some pleadings the committee doesn't have?

[fol. 80] Rep. Hull: Mr. Chairman, may I address the Chair?

I apologize to the gentleman. I thought we were on the House floor where everybody is interrupted from time to time, but be that as it may, excuse me, but I am trying to follow what the man is saying. I don't have a copy of his response, and I would like to have a copy of his response; nor do I have a copy of the statement he is supposed to have made, Mr. Bond.

Mr. Groover: I would like to call the Applicant, please.

The Speaker: Mr. Bond.

Mr. Groover: Mr. Chairman, as Chairman of the Legislative Special Committee, I would like the Chairman to administer the oath to the witness.

The Speaker: Any other witnesses in the room other than Mr. Bond? I would like to give them all at once.

Are these the only two witnesses in the room?

(Whereupon, those expecting to testify were duly sworn.)

Mr. Moore: There is no objection to the witnesses being in the room?

The Chairman: There has been none raised to the Chair. As no objection is raised to the Chair, we will let them stay in.

Whereupon,

[fol. 81] HORACE JULIAN BOND being called as a witness, having previously been duly sworn, was examined and testified as follows:

Cross examination.

By Mr. Groover:

Q. Would you state your name, please?

A. Horace Julian Bond.

Q. Are you the Horace Julian Bond to whom the protest has been filed with reference to this matter?

A. I am.

Q. I will ask you if you will, please, to examine Exhibit A to Petition A, which is a statement purportedly attributed to the Student Nonviolent Coordinating Committee.

A. I notice a mistake in it.

Q. Will you tell us what the mistake is?

A. It is the figure "60," should be "16."

Q. All right, sir, you obviously then are familiar with that statement?

A. Yes, I am.

Q. And how long have you been familiar with that statement?

A. Since Thursday afternoon.

Q. Did you participate in the draft of that statement?

A. No, I did not.

Q. After having seen that statement, did you make some statement relative to it?

[fol. 82] A. Yes, I did.

Q. Did you state that you concurred fully in that statement?

A. Yes, I did.

Q. Do you still concur fully in that statement?

A. Yes, sir, I do.

Q. Do you concur in all portions of that statement?

A. Yes, sir, I do.

Q. Without reservations?

A. Without reservation.

Q. Do you consider yourself a member, a duly member of the House of Representatives as of this moment?

A. Well, I have not taken my oath.

Q. Other than that, do you consider that you are being illegally deprived of your membership?

A. Well, I am not a lawyer. I don't know if I am qualified to answer that, sir.

Q. Well, whatever you consider yourself at this moment, did you consider yourself to have the same status immediately after the recess this morning of the House of Representatives, the same status as you have now, whatever your status is now?

Mr. Moore: I object to that. That is a multi-pronged question. If Mr. Groover is going to ask questions, he should ask one question at a time.

The Chairman: Mr. Groover, are you trying to ask Mr. Bond if he considers that he is in the same status now as [fol. 83] he was before the others were given the oath?

Mr. Groover: I asked him if he considered that whatever his status is now, that his status immediately prior—immediately subsequent to the recess of the House was the same as it is now.

The Witness: I am not sure I understand you, Mr. Groover.

Mr. Moore: We would call upon the Speaker of the House to make a ruling as to what his status was this morning. There has been no ruling on what his status has been.

Mr. Groover: My question was, whatever his status is now, if he, the witness, considers that he had the same status this morning.

The Chairman: I overrule the objection. The question may be answered.

The Witness: Let me make sure. You are asking me if I have now, or if I believe I have now the same status that I had at 10:00 o'clock this morning?

By Mr. Groover:

Q. Well, no, after the recess.

A. After the oath was administered to the other 204 members of the House?

Q. Yes.

A. I am not sure exactly what my status is, sir.

Q. After the recess this morning, did you reaffirm your [fol. 84] concurrence perfectly to the statement, Exhibit A, which you heretofore read?

A. Yes, I did.

Q. Now, I ask you, Mr. Bond, if you concurred in and support the following language:

> "We are in sympathy with and support the men in this country who are unwilling to respond to a military draft, which would compel them to contribute their lives to the United States' aggression in Viet Nam in the name of the Freedom which we find so false in this Country."

Do you concur in those words?

A. Mr. Groover, I support the statement in its entirety, and I think that one sentence follows another in it, and that one part has a connection to the other, but I agree with that statement.

Q. Do they express your views, Mr. Bond?

A. They do.

Q. The views that you had at the time of your public statement of concurrence and your present views?

A. They do.

Q. And do you apprehend that these are your continuing views?

The Chairman: What the continuing views are, they are out of order. What they are at the present time is all that we are worried about.

By Mr. Groover:

[fol. 85] Q. I will ask you this question, Mr. Bond. Have you stated publicly that you are in sympathy with those who burn their draft cards?

Mr. Moore: I object to that.

The Chairman: Is that a part of one of the allegations?

Mr. Moore: There is no allegation in the statement regarding the burning of draft cards.

The Chairman: If it is one of the allegations, I will allow the question.

Mr. Groover: It is not specifically alleged.

The Chairman: Which allegation are you talking about?

Mr. Groover: It says he cannot support the Constitution of the State of Georgia himself, as one of the grounds of the protest. It is in Count 2, paragraph 2.

The Chairman: I will overrule the objection and allow him to answer the question.

Mr. Moore: Mr. Speaker, response of the proponent to the objection was in fact non-responsive, because the question before him was whether or not Mr. Bond concurred with the statements alleged in Exhibit A, Petition A, to the effect that he believed that—that he agreed with people who burned their draft cards.

Mr. Groover: No, I asked him if he publicly stated that [fol. 86] he was in sympathy with persons who publicly burn their draft cards, that was the question.

The Chairman: I will overrule the objection and allow him to answer the question.

Rep. Alexander: Mr. Speaker, as a matter of procedure, it appears that we will have to limit the inquiries to the things which are stated in the petition, and it appears to me, Mr. Speaker, that inquiry into the burning of draft cards, when there is no allegation of fact, is a mere con-

clusion, and I don't think that we can take the time to go into all of these matters of conclusions.

The Chairman: Mr. Alexander, I think you are a member of the Committee. I think a member of the Committee would have to bring that up at the conclusion. I think your remarks are out of order at this time.

Under Count 2, they allege certain actions of his were a violation of the United States Code, United States Constitution, and I think under that allegation, questions of that, I will allow.

By Mr. Groover:

Q. First, I would like for the record to show that the first grammatical paragraph of Count 2, Mr. Chairman, I would like to show that the first grammatical paragraph under count 2 reads:

"Said Representative-Elect has said that he admires the [fol. 87] courage of those persons who burn their draft cards."

That is petition A.

The Chairman: I have already ruled that he could answer the question.

The Witness: I am sorry, could I ask you to repeat it?

Mr. Moore: The question isn't what is alleged in the paragraph. The question isn't what is alleged in the paragraph; what is alleged in the paragraph is that he admired the courage of persons who burn their draft cards. But what the proponent asked was whether or not he was sympathetic or admired persons who burn their draft cards, which is a different subject matter, which is not alleged in the petition and not raised.

By Mr. Groover:

Q. Do you admire the courage of persons who burn their draft cards?

A. I admire people who take an action, and I admire people who feel strongly enough about their convictions to take an action like that knowing the consequences that they will face, and that was my original statement when asked that question.

Q. Do you still adhere to that statement?

A. Yes, I do.

Q. Let me see if I have your statement correct, that you admire people who are willing to take the consequences, to [fol. 88] stand up for their principles, is that substantially what you said?

A. That is correct.

Q. And does that admiration of such people go to taking such a stand, when such a stand is in violation of a valid law of the United States?

A. I have never suggested or counseled or advocated that any one other person burn their draft card. In fact, I have mine in my pocket and will produce it if you wish. I do not advocate that people should break laws. What I simply try to say was that I admired the courage of someone who could act on his convictions knowing that he faces pretty stiff consequences.

Q. So that you admire the courage of the persons in the given instance who burn their draft cards, or who were willing to take the consequences for burning their draft cards?

A. That is right.

Q. Do you feel that such persons are justified under the Constitution of the United States—

Mr. Moore: I object—

Mr. Groover: May I finish the question.

The Chairman: All right, finish the question.

By Mr. Groover:

Q. Do you feel that under your interpretation of the Constitution of the United States, that persons are justi- [fol. 89] fied in defying, who exhibit their courage by defying a valid law of the United States?

Mr. Moore: Objection. There has been on interpretation of the Constitution put into evidence by this Representative.

The Chairman: Would you repeat that question, Mr. Groover?

Mr. Groover: I said that under his interpretation of the Constitution, does he admire the courage of a person and the right of a person to violate a valid law of the United States Code, burning a draft card.

The Chairman: I think he has already answered that question on two different occasions. Frankly, I just think he has answered the question, and I will sustain the objection, because I think he has answered it two different times.

Mr. Groover: All right, sir.

Rep. Hull: I am nothing but a member of the Committee, but what rules are we playing by? Can the members of the Committee ask a question?

The Chairman: The members of the Committee can ask a question after the protestant and respondent have finished with this particular witness. You just write your questions down now.

Mr. Richardson, over here?

Rep. Richardson: Mr. Chairman, I thought that at this [fol. 90] time, perhaps, for the Chair to remind both counsel that the procedure on which we are traveling, that you are chairman and are not ruling and acting as speaker of the House in session, because I think both counsel have asked you to rule as Speaker.

The Chairman: And you will notice I didn't rule.

You can continue.

Mr. Groover: Mr. Chairman, at this point I have some tapes I would like to set up and see if Mr. Bond could identify whether or not they are his voice or not.

The Chairman: Let both the Chairman and Mr. Bond understand what you propose to do. You propose to play a tape that purports to be Mr. Bond's voice, and you want to

know whether or not he will admit or deny that that is his voice and what he said?

Mr. Groover: That is correct.

Mr. Moore: We pose an objection to that. One, we request that it be done outside of the Committee; and two, we request that—We would object to the admissibility of such tape until it has been properly indicated. Until that time we would contend very strongly that the tape would be inappropriate and inadmissible in this hearing and highly prejudicial.

The Chairman: I am going to overrule the objection, pending the protestant proving, first of all, that this [fol. 91] evidence, that this tape that he is going to play was given free and voluntary to the press or some member of the press. If he can show that it was given in a press conference in response to a question, I am going to allow it.

If he can't prove that, I am going to disallow it.

Mr. Groover: Well, I think, Mr. Chairman, in fairness to him, I will get to that a little bit later because I would not want to prejudice his position before this Committee by playing it and having it already in their ears, and I think maybe the objection is well taken to that regard, and I will just withdraw the proffer, and that is all for this time.

The Chairman: You mean you rest now?

Mr. Groover: Of this witness.

The Chairman: You can go down, Mr. Bond, unless they have got another question.

Mr. Groover: That is all.

The Chairman: You can go down, Mr. Bond.

(Witness stepped down.)

The Chairman: Do you have another witness, Mr. Groover?

Mr. Groover: I would like the record to show, Mr. Chairman, that there were no requests issued for subpoenas

to the Chairman of this Committee, or to any other officer of this House of Representatives subsequent to its organization, or any other request for any form of compulsory process.

[fol. 92] The Chairman: The reporter will enter that up as a part of the record of the case.

Have you got any other witnesses?

Mr. Moore: May we have a response to that?

The Chairman: Yes, you have a statement.

Mr. Moore: We were advised that compulsory process was not available to these proceedings.

The Chairman: That is right, you were so advised.

Mr. Groover: Mr. Spivia.

The Chairman: Which gentleman do you want next?

Mr. Groover: Mr. Spivia.

The Chairman: Mr. Spivia.

Whereupon,

ED SPIVIA, being called as a witness, and having previously been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Groover:

Q. State your name, please.

A. Ed Spivia.

Q. What occupation, Mr. Spivia?

A. I am a newsman with WGST Radio.

Q. You took the oath a minute ago when the Chairman administered it?

A. Correct.

[fol. 93] Q. I will ask you, Mr. Spivia, if on today you had occasion to interview the applicant in this case, Mr. Julian Bond?

A. Today?

Q. Today.

A. I did.

Q. Where did that interview take place?

A. Outside the House Chambers in the hall.

Q. And can you give me the approximate time that that interview took place?

A. It was after the convening of the General Assembly, after which Mr. Bond walked out, I would say around 10:30.

Q. Prior to that had you taken, or had you had another interview with Mr. Bond?

A. Yes, I had.

Q. When did that take place?

A. Thursday, January 6th.

Q. I will ask you if you made a recording of those interviews?

A. Yes, I did.

Q. I will ask you if Mr. Bond at that time knew you were making a recording of those interviews?

A. Yes, he did.

Q. I will show you the two tapes and ask you if you can identify those tapes?

A. These are not the originals of the tapes. They are [fol. 94] recordings which have been unaltered.

Q. Did you make those, whatever you hold in your hands?

A. Yes.

Q. Do they correctly and without alteration depict or have on there what was said in those interviews?

A. Yes, they do.

Q. Has there been any alteration whatsoever?

A. No, there hasn't.

Q. Is that a record of the interview or a duplicate of the interview made with Mr. Bond on each of the occasions?

A. One is an interview of Mr. Bond on the telephone on Thursday the 6th. The other is an interview of Mr. Bond in the hallway today.

Q. And did he on each of those occasions know that you were making a recording?

A. Yes, he did.

Q. All right, sir.

Mr. Groover: Have we got that machine?

The Chairman: I have got a man hunting a machine. They misunderstood. They thought I asked for one to record something. I asked for one to play something.

Mr. Groover: In the interest of time, we will do that later. Do you have objection, Mr. Morgan, for us to go on and do that later to save time?

Mr. Morgan: I think we would like to know what the [fol. 95] case is against us before we proceed further.

The Chairman: Do you have any other witnesses?

Mr. Groover: No, sir, reserving the right—

I tendered them to him, and I thought he said he wanted to go on with the rest of the case before we proceed.

The Chairman: This is not the usual courtroom scene, so we won't get too technical about the way we do things around here.

You want to ask some questions, Mr. Moore?

Mr. Moore: Yes, sir.

Cross-examination.

By Mr. Moore:

Q. Mr. Spivia, is it Spivia?

A. Right.

Q. How long have you been employed with WGST?

A. Seven months.

Q. In what capacity are you employed with WGST?

A. As a news reporter.

Q. As news reporter what are your duties?

A. To gather the news and present it to our station for their presentation, and also to present the news on occasion.

Q. Do you have any responsibilities with respect to making tape recordings?

A. Yes, I do.

Q. What is that responsibility?

[fol. 96] A. It is my duty to take a tape recording of press conferences such as that one Mr. Bond held this morning,

and also it is my duty to record phone interviews such as that other recording of Mr. Bond on Thursday of last week.

Q. Do you have any duties with respect to making duplicate recordings from originals?

A. Yes, I do.

Q. What is that responsibility?

A. When I am called upon to make a duplicate of that, it is my responsibility to do so.

Q. Do you yourself make duplicates?

A. I do.

Q. Is there anyone else at WGST who makes duplicates?

A. All of the newsmen and the engineers are qualified and are requested at times to make duplicates.

Q. And who are they?

A. Ben Williams, Mike Jones, Dick Gray, Jim Pugh, Julian Clark, Mason Roberts, Norman Brooks, Johnny Murray.

Q. Which of them participated in making the duplicates of these interviews?

A. Dick Gray participated on one duplication process.

Q. Would you identify which one, please?

A. On the recording of Mr. Bond last Thursday.

Q. Go ahead.

A. That was the tape that Mr. Gray participated in the [fol. 97] duplication process on.

Q. Who assisted him, if anyone?

A. Myself and Mike Jones.

Q. What about the duplicate of the recording that allegedly was made this morning?

A. That was duplicated by Julian Clark.

Q. Did you participate in that?

A. I did not participate in the duplication, but I have heard the tape recording, and will testify that it is the recording of this morning's press conference.

Q. You were not present, however, at the time duplication was made?

A. I was not present at the time it was made, but I have listened to it and know that it is correct.

Q. You don't purport to testify before this Committee that you recorded everything that was said at the press conference this morning, do you?

A. I do recall the line of process, yes.

Q. I asked you, do you recall—

A. I don't recall everything, no, sir, I don't.

Q. So you don't know whether or not the duplicate recording tape is true, correct and complete, do you?

A. I believe strong enough that it is correct and has been unaltered to testify that it is correct.

Q. You base that solely on your belief?

[fol. 98] A. On my belief.

Q. Now, as to the recording that was made on Thursday, about what time was the recording made?

A. It was in the afternoon following the SNCC press conference. I don't know exactly what time it was.

Q. Did you call Mr. Bond?

A. I didn't call Mr. Bond. Another member of our staff did. I interviewed Mr. Bond on the phone at the time of the recording.

Q. What is the name of the person of your staff that interviewed Mr. Bond at the time of the recording?

A. The interview was made by myself and Dick Gray.

Q. Did Mr. Gray call Mr. Bond?

A. I assume he did, either Dick Gray or Mike Jones, one of the two, I don't know who placed the call.

Q. You don't know who placed the call?

A. It was either Dick Gray or Mike Jones.

Q. Did you yourself talk directly with the person on the other side of the line?

A. I did.

Q. You did?

A. Yes, sir.

Q. Did you identify yourself?

A. No, I did not.

Q. Did you at any time tell Mr. Bond that his statement [fol. 99] would be replayed?

A. I didn't tell Mr. Bond that. I am sure he was aware of it.

Q. But you have no personal knowledge that he was told or that he was aware of it?

A. No, I don't.

Q. Where did you work prior to coming to WGST?

A. In Sylva, North Carolina.

Q. Did you work in radio?

A. Yes, I did.

Q. How did you come to the attention of Mr. W. Jones Lane?

A. He called the station this morning and asked the station if we had a duplicate of the—or if we had the original tape of Mr. Bond's conversation on the phone with us last Thursday. The station management told him we did, that I had made the recording.

Q. You were not present at the time the conversation took place?

A. No, but he contacted me through that process.

Q. Do you know with whom he talked at the station?

A. No, I am not sure.

Q. And so you don't know whether or not he talked to the station manager or not?

A. I don't know whether he talked with the station manager. I know he talked with someone there.

[fol. 100] Q. Are you here on assignment?

A. Yes, I am.

Q. You are; are you a member of any groups that would be antagonistic to the Student Nonviolent Coordinating Committee?

A. No, sir, I am not.

Q. Of what groups are you a member?

A. I am a member of the National Jaycees and the Baptist Church.

(Applause.)

The Chairman: That's the first time I ever heard the Baptists applauded.

By Mr. Moore:

Q. The testimony which you have given here this far under oath relating to the recording to the press conference, the alleged press conference on Thursday—

A. No, there was no press conference on Thursday with Mr. Bond, that was a phone conversation.

Q. The alleged phone conversation with Mr. Bond on Thursday is all that you know about, the circumstances surrounding?

A. I was present at the SNCC press conference.

Q. I am talking about the telephonic interview that you allegedly had with Mr. Bond.

A. What about it?

The Witness: Mr. Speaker, I testified these statements are true.

[fol. 101] The Chairman: What was the last question?

The Witness: Do I have to stand up here the rest of the afternoon?

The Chairman: Your attorney ought to be protecting you, if you need any.

What was the last question?

Mr. Moore: The question I am asking is whether or not the matters to which he is testifying about thus far this afternoon are everything that he remembers about the telephonic conversation of Thursday, and the circumstances surrounding that telephonic conversation, allegedly with Mr. Bond.

The Speaker: I will let you answer that question.

The Witness: Would you state the question again. I don't understand it.

Mr. Moore: Would the reporter read the question back, please?

(Whereupon, the requested portion of the record was read back.)

The Witness: No, it isn't everything I remembered about it. There might be other things I remember, if you would like to ask me about them, okay.

By Mr. Moore:

Q. Mr. Spivia, do you know whether or not there is a law relating to having beepers on telephone conversations when they are recorded?

[fol. 102] A. I am not certain what this law is. I am aware that there is a law of that nature, or I think there is a law of that nature.

Q. You did not have a beeper, did you?

A. No, I did not.

Mr. Moore: No further questions.

The Speaker: You may go down.

(Witness stepped down.)

Mr. Moore: We move to exclude the so-called telephonic interview on Thursday with Mr. Bond on the grounds that, one, it violates the Federal Communications Act that requires that persons having an interview with a person over the telephone divulge the fact that he is going to release such a statement to third parties. This was a communication solely between Mr. Bond, if it was in fact between Mr. Bond, because there is no evidence that it was Mr. Bond who was on the phone. The witness who was on the stand testified that he himself did not call Mr. Bond. He does not know whether or not the number that was dialed, if the number in fact was dialed, was that of Mr. Bond. He also testified that he did not have exclusive control and possession of the tape recording, and the tape that was made therefrom. He has testified and put in evidence that persons other than himself had participated in the making of the duplicate tape recording, the duplicate tape.

We move to exclude on those grounds.

[fol. 103] Secondly, we move to exclude the telephonic statement—or pardon me, the tape of this morning on the

ground that the witness on the stand did not participate at all in making the duplicate tape, so that its reliability is in question and the proponent has the responsibility or the burden of establishing the reliability of the tape.

The Chairman: I overrule the objection.

You may continue, Mr. Groover.

Mr. Groover: Mr. Speaker, at this time, we would like to play the tapes in question.

The first tape to be played is the one on the Thursday, Mr. Spivia—

The Chairman: Please identify the tape for the Court Reporter.

Mr. Groover: This, Mr. Chariman, is the tape of the conversation on Thursday testified to by the witness:

(Whereupon, the indicated tape was played.)

Mr. Groover: Now, Mr. Chairman—

Mr. Moore: Mr. Chairman, I hate to be abrupt, but I would like to know if that tape will remain here so if any members of the Rules Committee—

The Chairman: All evidence will stay with the Committee.

Mr. Moore: Until the final—

The Chairman: It is completed, the whole hearing is [fol. 104] completed.

Mr. Moore: If they would like to have it played again?

The Chairman: Absolutely.

Mr. Groover: I tender that, Mr. Chairman, that tape just played, identified as the tape made on Thursday of last week, whatever date it was, as Protestant's Exhibit No. 1.

(Whereupon, Protestant's Exhibit No. 1 was tendered into evidence.)

Mr. Moore: Mr. Speaker—

The Chairman: Mr. Moore, I take it that you object to that evidence on the same grounds that you objected to it prior to its being played?

Mr. Moore: Right.

The Chairman: You want to renew your objections on that same ground?

Mr. Moore: Yes, sir.

The Chairman: Would the Court Reporter please note that he objected to it on the same ground as the objection that he raised prior to the playing of the tape.

Mr. Groover: Now, Mr. Chairman, we tender the tape, the playing of the tape, we tender as Protestant's Exhibit No. 2, the tape referred to by Mr. Spivia as having been made this morning.

[fol. 105] (Whereupon, Protestant's Exhibit No. 2 was tendered into evidence.)

The Chairman: Now, Mr. Moore, I take it that you are going to interpose the same objections to this tape that you did to the other one prior to its playing, is that correct?

Mr. Moore: That is correct.

The Chairman: The Court Reporter will so note, that he interposed the same objections to the playing of this tape that he interposed prior to the playing of the prior tape.

Mr. Groover: Well, excuse me, Mr. Chairman, it was my understanding that the only objection he interposed to this particular tape was that the—It has been testified as being a reproduction, and that the witness, Spivia, did not make the reproduction. I did not know that he had—I do not recall any other objections to that, to this particular tape.

The Chairman: What he did, he objected to both tapes, and by just interposing all of the objections to both tapes in the four different places, we will have the objection that he wants to all of them, and in each one apply the correct one without us trying to sift it out. That will cover the waterfront.

Rep. Alexander: A question of procedure, Mr. Chairman. [fol. 106] I understand members of the Committee are free to ask questions of each witness?

The Chairman: That's right, if you have a question you want to ask the witness.

Rep. Alexander: I have a question that I would like to ask relative to the tape that was just played.

The Chairman: Mr. Spivia?

Rep. Alexander: No, I would like to ask the counsel a question.

The Chairman: Address the question.

Rep. Alexander: I would like to know for the benefit of the Committee, exactly what point you hope to prove by playing the tape that you just played?

Mr. Groover: I hope to cover that in my discussion or summation to you of the matter, that the Applicant should be denied his seat. That is the point I am trying to make in everything I present.

Rep. Alexander: It may be somewhat lengthy. I wonder if you would state, just for the benefit of the Committee, what specifically in that tape that was just played is relevant to your argument and the issue before us?

Mr. Groover: Do you want me to argue my case now?

The Chariman: I don't want you to argue your case now. I am going to—Mr. Alexander, I think that in his summation that he will bring that point up. If he doesn't, I will [fol. 107] allow you to ask him the question again at the end of his summation, if he doesn't answer your question.

Rep. Alexander: I might say, Mr. Chairman, that I have several other questions, but I will hold them at the present time.

The Chairman: If a question hasn't been answered at the end of his summation,—The attorney doesn't answer them, or any of the witnesses, I will allow you to have them to come back.

Mr. Groover: I am delighted that he made that observation, for with that in mind, I will reserve some of my allotted time for Committee members to ask me questions.

The Chairman: Play the tape.

(Whereupon, the tape designated as Protestant's Exhibit No. 2 was played.)

The Chairman: And I take it again, Mr. Moore, you object to that evidence on the same ground that you objected to the first one before this one, and before the first one. Do you renew that objection?

Mr. Moore: Yes, sir, even though we think it is helpful to our case.

Mr. Groover: I take it that he doesn't want them to delete his speech of the others that is on the tape?

The Chairman: You offer it in evidence, is that right?

[fol. 108] Mr. Groover: Yes, sir, his and everybody else's.

The Chairman: It is admitted.

(Whereupon, Proponent's Exhibits 1 & 2, were admitted into evidence.)

Mr. Groover: Now, Mr. Chairman, I would like, for the purpose of the record, I think that this Committee can take judicial notice of it, to introduce into evidence, Section 50 of the United States Code 462 (a) and (b), having to do with the draft.

I would also, purely because of the following statement in the answer or the response: Paragraph 12 of the response reads:

> "The challenges, contests, and petitions against Representative-Elect Julian Bond, Respondent, are racially based and racially motivated; are based upon Respondent's association and statements regarding racial matters; and are thereby in violation of the First, the Thirteenth, the Fourteenth Amendments of the Constitution, the equal protection and due process clauses thereof, and the Fifteenth."

Paragraph 12 of the response, and solely, I want to emphasize that, Mr. Chairman, solely because of that statement in the response, I would like for the record to state,

to show that on today, seven persons other than Mr. Bond, [fol. 109] who were Negroes, presented themselves for the oath of office, and they had that oath of office duly administered.

I take it, Mr. Chairman, that as Speaker, you will confirm that that was a fact,

The Chairman: The reporter will so note.

Do you rest your case?

Mr. Groover: Furthermore, Mr. Chairman, I would like to show, I would like for the record to show that two members of this Special Committee are Negroes, duly elected and certified and sworn in, and with that, Mr. Chairman, we rest.

The Chairman: The Court Reporter will so note.

The Respondent will now be heard from.

Mr. Moore: The Respondent respectfully moves to strike and dismiss the petition seeking to withhold or deny him the right to take his seat, to take the oath, to be confirmed as a member on the grounds that the movant, proponent, has introduced absolutely no evidence, no evidence whatsoever showing any legal cause for Representative-Elect Julian Bond's not being permitted at this time to be sworn in by the House of Representatives and permitted to take his seat; that all the evidence shows that Mr. Bond has courageously exercised his right of free speech, about which Mr. W. Jones Lane, who is a member of the House of Representatives, and several others disagree.

[fol. 110] The Chairman: I deny the motion.

The Respondent will proceed.

Mr. Moore: The Respondent calls the Reverend Howard Creasy.

Mr. Chairman, would you administer the oath, please.

The Chairman: Reverend Creasy, will you hold up your right hand.

Whereupon,

HOWARD WILLIAM CREASY, being called as a witness, and after having first been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Moore:

Q. Would you state your name, please?

A. Howard William Creasy.

Q. Where do you live, sir?

A. At Ashby and Fair Streets, at 200 Ashby Street.

Q. What is your business or profession?

A. A minister.

Q. And where is your church located?

A. The Mount Moriah Baptist Church, at the corner of Ashby and Fair.

Q. Is that in the 136th House District?

A. It is, sir.

[fol. 111] Q. Do you live in the 136th House District?

A. I do, sir.

Q. How long have you been a minister?

A. About 25 years.

Q. And where have your pastorates been?

A. Louisiana, Alabama, and now Georgia.

Q. Were you a candidate in the Democratic Primary for election, for nomination rather, to House Seat 136?

A. I was.

Q. Do you know the Respondent, Julian Bond?

A. I do, sir.

Q. Did you meet him during the campaign?

A. I did.

Q. During the course of campaign, did you have an opportunity to form some opinion as to his character?

A. I did, sir.

Q. Is it your opinion that his character is such that he could be relied upon?

Mr. Groover: Mr. Chairman, I object to the question. Nobody is attacking Mr. Bond's character in the sense of his moral character. There has been no foundation laid here as to what type character the Reverend Creasy is testifying about. We are talking about whether or not the gentleman has placed himself in a position so as not to be qualified for membership in this House. His moral char-
[fol. 112] acter is not an issue in that regard.

The Chairman: I will let him answer the question.

By Mr. Moore:

Q. Would you answer the question, please?

A. Would you kindly restate the question.

Q. Would you believe Mr. Bond if he testified under oath?

A. Should he be—How was that again?

Q. Would you believe Mr. Bond if he gave testimony under oath?

A. I would.

Q. From your experience in the community, do you have any opinion as to his fitness and suitability for the office of the House of Representatives?

Mr. Groover: Mr. Chairman, I object to the question as being irrelevant, immaterial to the issue being determined, the issue which is being determined by this Committee, and secondly by the House.

The Chairman: What was that question, Mr. Moore, I didn't understand it.

Mr. Moore: I asked him whether or not he considered Mr. Bond a man fit to take his seat in the House of Representatives?

The Chairman: I will let him express that opinion.

The Witness: I do.

Mr. Moore: The witness is with you.

[fol. 113] Mr. Groover: No questions.

The Chairman: You may go down, Reverend.

(Witness stepped down.)

The Chairman: I would like to state at this time just to clarify something on these various motions that you gentlemen are making to dismiss the petition. I ruled on that.

That is the prerogative of the Committee to rule on that as a whole, and that will be one of the matters the Committee will rule on when we start considering the case as a whole. The Committee will vote on whether or not they will uphold my ruling or not. If they don't agree with my ruling, then it's out and gone. The Committee as a whole will pass upon that question when the case is finally rested. I ruled on it only to get the whole matter before us.

Mr. Moore: Mr. Malcolm Dean.

The Chairman: Raise your right hand, Mr. Dean.

Whereupon,

MALCOLM J. DEAN, being called as a witness, and after having first been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Moore:

Q. Will you state your name, please?

A. Malcolm J. Dean.

[fol. 114] Q. Where do you live, Mr. Dean?

A. I live at 50 Chestnut Street, Southwest.

Q. What is your business or profession?

A. Dean of Men, Atlanta University.

Q. How long have you been Dean of Men there?

A. For three years.

Q. During the summer of 1965, did you have occasion to enter political life?

A. Yes.

Q. In what capacity or what office did you enter the political world?

A. Running for the House of Representatives for the District 136.

Q. Were you affiliated with a party?

A. Yes.

Q. Will you identify that party for the record?

A. The Republican Party.

Q. Who was your opponent in that election?

A. Mr. Julian Bond.

Q. Do you know who won the election?

A. Yes.

(Laughter)

The Chairman: Maybe that got all the tension out of us. Maybe we can loosen up and go ahead.

By Mr. Moore:

[fol. 115] Q. Do you, yourself, Mr. Dean, know the margin of victory which Mr. Bond had?

A. Yes, it was about 2,300 to 486.

Q. During the time that this campaign was being conducted, did Mr. Bond do anything that you observed or saw or know as a matter of personal knowledge, which you consider improper or dishonest?

Mr. Groover: Mr. Chairman, I object to the question, irrelevant and immaterial—

The Chairman: The objection is overruled.

Mr. Groover: Excuse me, let me finish stating it, please.

The Speaker: Your objections are too long. Go ahead.

Mr. Groover: You have been accusing me of that for two years before now, Mr. Chairman.

—and the fact that the statements which have been made are subsequent to the time testified.

The Speaker: I will overrule the objection with this further observation: They were too long back there, too. You may continue.

Mr. Groover: Some of the House didn't think so.

By Mr. Moore:

Q. Mr. Dean, you may answer the question.

A. Will you please restate the question?

[fol. 116] Q. The question was, during the course of the campaign, do you have any firsthand knowledge or information as to whether or not Mr. Bond did anything improper or dishonest during the course of the campaign?

A. No, Mr. Moore, I think he conducted a very clean campaign. The constituents of District 136 chose Mr. Bond instead of me. There was nothing done during that campaign that would cause me to lose any disrespect for Mr. Bond whatsoever.

Q. Are you familiar with the events of the last couple of days since Thursday?

A. Yes.

Q. Are you familiar with the fact that Mr. Bond made the statement with respect to the war in Viet Nam?

A. Yes.

Q. Is it still your desire that Mr. Bond take his seat?

A. It is.

Mr. Groover: Objection.

The Chairman: The objection noted and denied.

By Mr. Moore:

Q. Did you lose any respect for Mr. Bond as a result of his statement of Thursday?

Mr. Groover: Objection.

The Chairman: Noted and denied.

The Witness: Mr. Moore, Mr. Bond was stating his opinion, and I believe that it is our God-given right to do so.

[fol. 117] Mr. Groover: Now, that is not responsive.

The Chairman: I will rule that out. That's right, that is not in response to the question. The gentleman is right. I sustain his objection to that.

By Mr. Moore:

Q. Do you know of any reason, based upon your own personal knowledge, why Mr. Bond should not be permitted to take his seat in the House of Representatives at this time?

A. No, and I think it is very unfortunate that this situation would come up in this session.

Mr. Groover: I move to strike that.

The Chairman: I will strike the part about "it's unfortunate that it came up," and I will allow the rest of it to stand.

Mr. Moore: That is all.

The witness is with you.

Mr. Groover: No questions.

(Witness stepped down.)

Mr. Morgan: Mr. W. Jones Lane.

The Speaker: Raise your right hand.

Whereupon,

W. Jones Lane, being called as a witness, and after having first been duly sworn, was examined and testified as follows:

[fol. 118] Cross-examination.

By Mr. Morgan:

Q. State your name, please.

A. Jones Lane.

Q. Where do you reside?

A. Statesboro, Georgia; Bulloch County.

Q. And that is District Number?

A. Sixty-four.

Q. You are a member of the House of Representatives, State of Georgia?

A. Yes, sir.

Q. Are you a complainant in this matter as a principal?

A. That's right.

Q. Mr. Lane, do you recall inviting Governor George Wallace to speak before the House of Representatives?

A. I did.

Q. Do you recall Governor Wallace on numerous occasions calling for disobedience of Federal law?

A. I believe he disagreed with the integration of the colleges. I think that is right.

Q. You disagree with the integration of the colleges, do you not?

A. No, sir.

Q. How about grammar schools?

A. No, sir, I make no objection to it. We have got them [fol. 119] in our school right now.

Q. Are you for integration, sir?

A. I am for it if the Courts say that that is the law of the land. I am willing to obey the law of the land.

Q. But you were willing to have Governor George C. Wallace speak before this legislature and invited him to do so?

A. I did.

Mr. Morgan: Thank you, sir, that is all.

The Chairman: Any other witnesses?

Mr. Moore: Yes, sir.

Senator Horace T. Ward from the 39th Senatorial District.

The Chairman: Senator Ward? Is Senator Ward in the room?

Raise your right hand, Senator.

Whereupon,

SENATOR HORACE T. WARD, being called as a witness, and after having first been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Moore:

Q. Will you state your name, please?

A. My name is Horace T. Ward.

Q. Mr. Ward, what position in government of the State [fol. 120] of Georgia do you hold, if any?

A. I am a State Senator representing the 39th Senatorial District of Georgia.

Q. Does that include the District of Mr. Julian Bond?

A. It does.

Q. Senator Ward, do you have a statement that you would like to make on behalf of the Respondent at this time?

A. I do.

Q. Would you make your statement, please?

Mr. Groover: Mr. Chairman, he identified the gentleman and then asked him, "Do you have a statement to make on behalf of Mr. Bond at this time?"

And his response was, "I do."

And he said, "Will you make the statement at this time?"

I object to him making a speech.

The Chairman: I would object to it unless the gentleman identifies in which area he wishes to make a statement on his behalf.

The Witness: Mr. Chairman, my statement is largely the—

The Chairman: I tell you, I am going to let him make his statement, then I will know whether to rule it out or not.

The Witness: Thank you, sir.

[fol. 121] The Chairman: They do it that way in court all the time.

The Witness: Mr. Chairman, Gentlemen, it is a real pleasure for me to come here today and come before this very distinguished committee.

The Chairman: Senator, now, just one thing. I am not trying to cut you off, but don't make a speech. Just make a statement.

The Witness: At the same time, Mr. Chairman, it is a great pleasure to be a citizen of this State, and a great honor for me to represent many of the people therein.

I say that I have read the statement made by Mr. John Lewis, and I have read many of the accounts in the newspapers which have been attributed to Mr. Julian Bond. I am a lawyer, a veteran, and a State officer, and as such I don't need to prove my patriotism or my loyalty, but I will say that I do not believe in draft card burning, or evasion of law, of counseling evasion of law.

I have known Mr. Julian Bond for over five years, since he was a student in college. At the same time, Mr. Julian Bond resides in my Senatorial District, and I have known his more intimately recently.

Since this matter broke last week, I have talked with Mr. Bond at length, concerning his statement, and concerning his views and his convictions. Based on the fore-[fol. 122] going, and based on my information and belief, I am convinced of the following: That his statements have been greatly misunderstood by people throughout the State. Secondly, that these statements were made out of conscience and conviction, and not after subversion and agitation. That Mr. Bond is not a member of the Communist Party. Mr. Bond would not conscientiously advocate the burning of draft cards nor the evasions of laws of the United States.

I feel that he is a loyal American. I feel that he will uphold the oath if he is permitted to take it. I feel that he will be a good citizen and a good Representative, and

I conscientiously urge upon this Committee that he be allowed to take his seat.

The Chairman: Do you renew your objection, Mr. Groover?

Mr. Groover: That is all right.

The Chairman: He does not renew the objection, so the statement stands.

Thank you, Senator.

Wait a minute, he may have a question. Just a moment.

Mr. Moore: No further questions, Mr. Chairman.

Mr. Groover: No questions.

The Chairman: No questions. You may come down, Senator.

[fol. 123] (Witness stepped down.)

The Chairman: Next witness.

Mr. Moore: Mr. Chairman, may I make an inquiry.

Is WGST a state-owned radio or television station?

The Chairman: I don't know. So far as I know, it is not. You will have to ask somebody besides me, Mr. Moore, because I don't know.

Is WGST owned by the State?

Yes, it is; yes, it is. We will take judicial knowledge of that. I didn't know it, but we will take it.

Mr. Moore: And that Mr. Spivia is an employee of that station?

The Chairman: He is an employee of that station. Yes, that's right.

Mr. Moore: The Respondent calls in his behalf at this time the Honorable LeRoy R. Johnson, from the State 38th Senatorial District.

The Chairman: Senator Johnson.

Raise your right hand, Senator.

Whereupon,

SENATOR LEROY JOHNSON, being called as a witness, and after having first been duly sworn, was examined and testified as follows:

Direct examination.

[fol. 124] Q. Will you state your name, please?

A. LeRoy Johnson.

Q. Where do you live, Senator Johnson?

A. 372 Larchmont Drive in Atlanta, Georgia.

Q. Do you hold a position in the State government of the State of Georgia?

A. Yes, sir, I do, as a Senator from the 38th District.

Q. Senator Johnson, do you have a statement to make at this time relating to the issues surrounding the right of Mr. Julian Bond to take a seat in the House of Representatives?

A. Yes, sir, I do.

Q. Will you make that statement, please?

A. Mr. Speaker, and gentlemen of this august body—

The Chairman: Senator, I impose the same warning: A statement and not a speech.

The Witness: Yes, sir, thank you.

I speak to you today, not as a Negro, though I am very proud of my heritage, but as a Georgian, and I want to thank you for this opportunity to this Committee for appearing before you.

Now, I stand before you as a member of the Georgia Legislature, believing in the Constitution of the United States and the Constitution of Georgia, and supporting, if you please, our Country's foreign policy in the Far East and in the Middle East. In 1962, when I was elected to the Senate, I adhered to the policy of responsibleness, and I [fol. 125] have sought since my election to be responsible and to act responsible on every occasion and in all endeavors.

Since 1962, we have come a long way in this State. I have watched progress take place before my very eyes,

and I have been a part of and witnessed events which some said could never take place in the State of Georgia. The image of this great State since 1962 has been one of continuing progress when compared with our sister states like Alabama and Mississippi.

The present administration under the leadership of the Governor of this State has had an unusual success beyond the boundaries of Georgia in improving the image of this great State. Now, gentlemen, we are confronted with an issue which could do irreparable damage to the great image of this great State, and could, in the eyes of the world, set us back to the uncolorful days of the past.

I do not personally approve of the statement that gave rise to this controversy; however, I am aware of the fact that the issue before us today is whether or not Representative Julian Bond is loyal to this Country and will support the Constitution of the United States and the Constitution of Georgia, and whether or not he advocates the violation of Federal laws.

If Mr. Bond states before this Committee that he is [fol. 126] willing and prepared to take the oath of office, thereby declaring his loyalty to this Country and supporting the Constitution of the United States of "Georgia," and if Mr. Bond, as a part of the oath, states before this Committee, that he is not a member of the Communist Party, and if Mr. Bond states he has not counseled or advocated the violation of any Federal laws; then it seems to me that this Committee should, without question, vote to seat Representative Julian Bond.

I call to your attention, Gentlemen, this statement issued today, in which the questions I raised have been answered by Mr. Bond, I believe, to the satisfaction of Members of this Committee.

He has stated that he will take his oath. He has stated that he has never counseled the burning of draft cards, and he has stated that by taking his oath, he is loyal to this Country, and is not a member of the Communist Party.

Gentlemen, I suggest that though we may disagree with the statement made by Representative-Elect Bond, we must be very, very careful in establishing a dangerous precedent that may ouster a man from this body for dissenting from a governmental position. Let us keep in mind that this statement made by Mr. Bond was made by Mr. Bond as a private citizen and not as a member of this legislative body. Let us keep in mind that Mr. Bond is only 25 years of age. This is his first political venture, and he is bound to be misunderstood. Mr. Bond's effectiveness has been [fol. 127] greatly damaged in this Legislative body, and he has undergone, I am sure, many unpleasant experiences.

In my judgment this man has suffered and has been punished to such a degree that it would do this august body little or not honor to deny him his elective seat.

I, therefore, urge this Committee with all of the sincerity that I can muster that we not be stampeded into performing an act today which may be an albatross around our neck for the next decade. Let us therefore disagree, if we please, but let us never ouster or expel a member of this body who is willing to take the oath of office and pledge his loyalty to this Country, and support the Constitution of Georgia and the United States. Though we may disagree, let us never go on record as expelling any member doing such because he has dissented from a governmental position.

Thank you, Mr. Chairman, and gentlemen of the Committee.

The Chairman: Any questions by either side?

Any questions, Mr. Groover?

Mr. Groover: No questions.

The Chairman: No questions from Mr. Groover. Anything further, Mr. Moore?

Mr. Moore: No questions.

The Chairman: Come down, Senator.

[fol. 128] (Witness stepped down.)

Mr. Morgan: At this time, may we address the Chair?

At this time, our case is now complete, since so much

of the evidence that would have been favorable to us has been put in by Mr. Groover.

We do have with us, of course, Mr. Bond. It is my understanding that he will be subjected to questions after Mr. Groover presents the remainder of his evidence, and any argument that comes up.

The Chairman: The Committee can ask Mr. Bond any questions they want to, and also inquire of counsel about anything they want explained further.

Yes, he will be, Mr. Bond will be called back for any questions from any member of the Committee at any time.

Mr. Morgan: Now, I am trying to understand. We will rest with that stipulation, that he will be questioned by the Committee.

The Chairman: The proponent has the opening and the closing, a 30 minute combination of the two, and the respondent has 30 minutes also, sandwiched in between.

Mr. Groover: Do I understand that the Chair has established the procedure that after counsel and Mr. Bond, for the applicant and myself, for the protestant, have made our summations, that the Committee will then call back other people, or will that be done prior to those summations?

[fol. 129] The Chairman: After all the summations have been made, then the Committee, if they wish to question anybody, may question him on the statements that you make and on the—I will call Mr. Bond back, and ask if they have any questions of him they wish to ask after the summation on both sides.

Mr. Groover: Well, Mr. Chairman, thank you.

Mr. Chairman, I desire at this time, to take not in excess of 10 minutes of the 30 minutes allotted to me in my opening remarks, and rather than addressing this Committee for that 10 minutes, or such portion thereof as it shall require, I will at this time be delighted to answer or attempt to answer such questions as any member of the Committee might have that would require some clarification.

I believe Mr. Alexander indicated some desire earlier.

The Chairman: Does any Committee Member desire to ask Mr. Groover any questions?

Rep. Alexander: Yes, sir.

The Chairman: Mr. Alexander.

Rep. Alexander: I would like to know, first, do you contend that a member of this body must conform to the prevailing views of any political body?

Mr. Groover: In no way must a member of this body conform to the political views of any body at any time, but he must, if he is to take an oath, conform to the laws that are on the books, and not advocate or condone their viola-
[fol. 130] tion, nor to approve of others who advocate and condone their violation.

Rep. Alexander: Can you state whether or not you are aware of any official of the United States Government who has issued any statement to the effect that any member of this House, or member-elect, has violated any United States law?

Mr. Groover: This House of Representatives of the State of Georgia is the judge of members, of the qualifications of its members, and I don't care what any member of the Congress of the United States, including the President, has to say on the subject. This is the body that is called on to judge that.

Rep. Alexander: I would like to know whether or not you are aware of any statement in the past having been made by any member of this House or the Georgia Senate relative to any governmental official or any acts passed by the United States Government?

Mr. Groover: Yes, sir, a heap of us has criticized President Johnson, and a heap of people criticized Senator Goldwater. There has been a lot of statements made about a lot of people, but I am not aware of a member of this body, either at the present time or in times of which I had any knowledge actively advocating the giving aid and comfort to the enemies of the United States of America.

Rep. Alexander: You agree, don't you, that the last [fol. 131] statement is a matter of opinion as to giving aid and comfort? You realize that is a conclusion?

Mr. Groover: I propose to address myself to that rather thoroughly in just a few minutes.

Rep. Alexander: Now, back to this tape, would you state for the body, what do you intend to prove by the first tape that you played?

Mr. Groover: Well, first, he said in the one on Thursday that he is eager and anxious to encourage people not to participate in a war for whatever, for any reason, and that is a direct quote, for any reason, and I think that is treasonous if one ever existed. Now, on limited grounds with conscientious objection, on grounds recognized by the law of this land, but to say that he would encourage and was eager and anxious to encourage a person not to participate in the defense of the Country for any reason; what greater treason could there be?

Another thing he said, and I propose to address myself a little further, when asked the question, when asked the question if he thought that it was treason, that if this Country was at war, if it would be treasonable to advocate what he has encouraged and advocated, he didn't say "no." He said, "I would have to think about it. I would have to think about whether I am willing and strong enough to commit treason." That's one thing it showed.

[fol. 132] The Chairman: Another question?

Rep. Alexander: Yes, you made reference to the United States Code dealing with the draft. Will you state what you intend to prove by citing that?

Mr. Groover: Well, among other things, it says you shall not interfere with the draft. You shall not interfere with the identification registration, identifications that are given by the duly authorized people of the Selective Service.

Rep. Alexander: Can you interpret any statement, do you interpret a statement that any person makes relative

to the draft and Viet Nam as being a violation of that section?

Mr. Groover: I do, and I will refer to that a little bit later.

Rep. Alexander: I see, and you think that any member of the House or Senate who expressed a contrary opinion should not be seated?

Mr. Groover: No, sir. No, sir, that is not what I said. I will address myself a little further to that for such edification as I may be able to give you.

Are there any other questions?

Mr. Hull, I yield to the gentleman from Richmond.

Rep. Hull: How long have you sat in the House of Representatives?

Mr. Groover: Well, I served six years.

[fol. 133] Rep. Hull: Mr. Groover, I ask you, if a member of the House of Representatives willfully advocated that the people of the State of Georgia disregard the Civil Rights Act in its entirety, willfully and maliciously, would you think that this body should inquire into such a statement?

Mr. Groover: If he advocated the willful violation, but not raising the question of whether it has any validity, that is a different story. If he advocates going to the courts to find out what the law is, whether the Constitution has been violated, then that is one thing; but I don't take it that there is any question that the Constitution of the United States authorizes this Country to protect itself through duly enacted laws of the Congress of the United States.

Are there any other questions?

Rep. Melton: Mr. Groover, the Petition in paragraphs 4 and 5, are those the draft code sections, or will you read those?

Mr. Groover: Which particular petition were you referring to?

Rep. Melton: That is Petition A, second page, paragraph 4 and paragraph 5.

Mr. Groover: I have that volume here.

Rep. Melton: I understand they were read in the record, but I am particularly interested in them.

Mr. Groover: The verbiage of them was not read into [fol. 134] the record. Now, I will be—

Rep. Melton: You referred to them, I believe?

Mr. Groover: Yes, sir, I referred to them.

Rep. Melton: They are available?

Mr. Groover: Yes, sir, they are.

Rep. Groover: Do those sections pertain to the draft or to treason?

Mr. Groover: To the draft.

Rep. Melton: Now, do you propose to, well, you said you proposed to elaborate on treason, what about aid and comfort to the enemy? Do you plan to define that in more specific terms?

Mr. Groover: I plan to give you my views on it, Mr. Melton. Whether they will be compatible with yours is going to be question.

Rep. Melton: Well, that is the question of what I am here to vote on. That is the reason I am asking the question.

Mr. Groover: Yes, sir.

Rep. Melton: I am quite interested in a specific definition as the courts have held, what is aid and comfort to the enemy, and also, what is treason?

Mr. Groover: Well, I propose to give you a little bit later, the action of the Congress of the United States at one time.

[fol. 135] Now, Mr. Melton, for your benefit, I want it to be as much help to this House as I can. It is not my job to either advocate or not advocate his seating or rejection, but I was called in Macon, Georgia, and left Macon at 20 minutes till 1:00 today, the first I knew I was going to be here, so how much help I am going to be may be dubious.

Rep. Melton: Mr. Chairman, I addressed these questions to Mr. Groover simply because he prefers to prevent argument and because I am a member of the Committee, I am particularly interested in a specific definition of those two subjects.

The Chairman: Any other questions?

(No response.)

Mr. Groover: I believe, Mr. Chairman, that leaves me 20 minutes in conclusion?

The Chairman: Correct.

Mr. Morgan: First, I would like to thank you and the Committee, Mr. Chairman, for letting me appear here with Howard Moore and the privilege of counsel for Mr. Bond, and the right to speak to you for a few moments.

I have 30 minutes. I don't intend to take them all because I think the message is rather clear and rather short and simple and to the point.

In 1964, a campaign was run in the United States of America for President. Certain courses of action were [fol. 136] advocated in that political campaign by a man named Johnson and a man named Goldwater. They fought their battle. The positions may have changed but they debated in free American society with the right of free speech, and they clarified their positions.

Surely no one here would deny anyone here that right. Surely to set such a precedent here in the case of Julian Bond might another day come haunt this assembly, and haunt this Georgia house.

I know that the evidence presented thus far assists Mr. Bond in his case. You may disagree with him. Voltaire would agree with his right to disagree. Voltaire would have fought for the right to disagree to the death. I should certainly hope that we of the South would do the same. Many of us in the South have disagreed with many things for many years, and how could we censure someone for feeling another way about a crucial national issue.

Not only should the subject be debated, the subject of Viet Nam, but Bill D. Moyers, the President's press secretary, the Commander-in-Chief's press secretary, on November the 26th, stated exactly that, that the President believed in the right of dissent and the right to disagree.

Now, since the days of Tom Paine and Thomas Jefferson, the days of the men who wrote about the right to disagree and the men who gave us the Constitution of the United States for which Mr. Bond stands today, and the men like Madison who gave us the First Amendment, and others; [fol. 137] Mr. Bond has a right to speak, and that is purely and simply all that this case is about.

Socialists were elected in New York. Who came to their aid when the legislative body attempted not to seat them? The Republican nominee for President in 1961, and a former distinguished Chief Justice of the Supreme Court of the United States, Charles Evans Hughes.

Now, I understand Mr. Groover's position to be that Mr. Bond has either committed treason or give aid and comfort to the enemy. If Mr. Bond has done either of those two things then the proper place for Mr. Bond to be tried for either of those two things is in a court of law. And if a member of this body desires to swear out a warrant for Mr. Bond's arrest, then surely that should be done. But that is not what this is all about.

This is about the right of every Georgian, and every man to speak for segregation or against it; for the war in Viet Nam or against it; for whatever he desires.

Now, I want to mention to you that there was a man named Tom Watson once in Georgia. His statue stands not far from here, and it is my recollection that just after the First World War, Mr. Watson, in many of his speeches in Georgia, was against and opposed to the Selective Service law, and so stated. Would he have been denied a seat in this House?

[fol. 138] Now, with my belief in the South, and my belief in the youth of the nation, I just want to tell you a story

that comes back to me from college, which was the University of Alabama. In 1952, someone was quite concerned at that time about the rise of the United States Senator named Joe McCarthy. We were in the seminar, and the professor came back in with a letter, which was to demonstrate the youth of America.

The letter was something like this. It was signed by R. M. Brownlow. Mr. Brownlow died September before last.

"You were correct in your recollection of our recent conversation. When I was a young man, a reporter in Washington for a newspaper in 1904 or 5, I was walking across from the old House Office Building with Representative Arthur Slaton and an elderly gentleman named Herb Moye from Texas. Slaton was a Representative from Texas. As I walked across the street, the old man had gray hair on the nape of his neck, and a black string tie. As they walked along, the statement was made by Slaton, who was on the House District Committee: 'Have you ever seen a school board that wasn't composed of absolute nincompoops?' Whereupon, Brownlow responded that he had not, and the elderly gentleman harumphed, and he said, 'Well, I have. My father was a member of that board in Albemarle County, Virginia, and one day I met, with my hand in my father's, three other men, members of that board. They stood on a dusty road, and they decided to build another school house.' And that day, the old man said, [fol. 139] he met Thomas Jefferson, James Madison and James Monroe."

The man died September before last who met a man who had met Madison, Jefferson and Monroe. You live in a young nation, the youngest and most revolutionary of ideals, and ideals for the whole world.

What we are supposed to be fighting for in Viet Nam is the right of man to speak freely there and here. We cannot put, when a man speaks freely here, fight a war in Viet

Nam if you censure him, and if you refuse to seat him because of his free expression, we cannot truthfully say to the world that the United States is free. Mr. Bond's statement would be proved correct.

Mr. Groover is and has been close to many of you. He is an accomplished attorney, an advocate, and a skilled speaker. We have no opportunity to rebut Mr. Groover, of course. He will speak to you, I am quite certain, I trust, in non-passioned tones. I know that you will make your own decisions.

I do know this though: Demonstrate to yourselves, demonstrate to the world abroad that there is freedom here in Georgia. Demonstrate to the people that what Americans are supposed to be fighting for, demonstrate that we can really exercise those rights here. This Committee has this power, and so does this House of Representatives.

[fol. 140] Thank you.

The Chairman: Does somebody else, Mr. Moore, do you wish to make a statement?

Mr. Moore: Mr. Bond is here, and any members of the Committee.

The Chairman: Mr. Groover has the closing. After Mr. Groover closes, then Mr. Bond will be subject to questions.

You have completed oral arguments then?

Mr. Groover: No, sir, they sure ain't.

The Chairman: No, sir, I am just calling on you to complete your twenty.

Mr. Groover: Mr. Speaker, Mr. Chairman, pardon me, gentlemen of the Committee, I am well aware and subscribe to that philosophy spoken of by Voltaire when said, "I disagree with what you say, but I shall fight to the death for your right to say it."

Yes, I have had the privilege of serving with many of you, and I, in my time here, I do not believe that I have ever stood in the well of this House and attempted to sway to one side of the issue rather than the other against my consicence, and against my convictions, and unless I felt

that the facts justified them. Some of you do not know me. You are perhaps better off, but if you would like any testimony to my sincerity, turn to the man who has served with you, with me, next to you, and ask him if I have ever attempted to mislead you.

[fol. 141] As I stated a few moments ago, I was called into this matter at 12:30 while still in Macon, so with such preparation as I could make was riding in an automobile between Macon and Atlanta, and I sincerely desire to be of help to the House in the resolution of this matter; not to participate in it; not to advocate, as an advocate, one side of the issue rather than the other; but rather to assist you in your thinking.

The glossover, which is exactly what has been done, of the import of what has been said and what has been done by Mr. Bond before he presented himself, and by his associates to whose views he now subscribes, continues to subscribe, cannot be answered simply by saying, "You may be next."

That is the essence of what has been said. If Julian as a private citizen stood upon the streets of the City of Atlanta and said, "I sympathize with and support the men in this Country who are willing to respond to a military—who are not willing, who are unwilling to respond to a military draft which would compel them to contribute their lives to the United States' aggression in Viet Nam," he would have that right, and would be subject only to such sanctions as the United States government saw fit to impose.

But that is not the issue. If you, as a private citizen, stood upon the streets and said, "I will fight to the death," or "blood will run in the streets," or "No, not one," and [fol. 142] advocated defiance of a Federal edict of a Federal Court applying to you, in a case duly brought against you, or in a Federal Statute, then you too would be subject only to such sanctions as the Federal Government and those Courts might impose. But the Constitution

of this State imposes upon you not alone the duty to assemble here together and pass laws for the government of its people, yourselves included, but it imposes upon you not just the right, but also the obligation to judge the election and qualification of your members.

If some group, some time, sent to you a member who obviously advocated the overthrow of the State Government or Federal Government by force and violence, certainly it would not only be your right but it would be your duty to refuse to admit him among your membership, and to refuse to permit the people of the State of Georgia to be governed in part by his actions.

Mr. Bond spoke as an elected, duly elected Representative. He spoke at a time only a few days, three days before he knew he would present himself before this House, and that his qualifications, not just his election, but that his qualifications and his ability to take the oath would be open for inspection. He saw in those three days that not only himself, not only the protestants in this matter, but persons who have appeared here and made statements for him, disagreed with and were concerned with his statements to such an extent that he saw fit, in Sunday's paper, [fol. 143] to issue a clarifying statement, but still his statement is the same tenor, still this morning, having presented himself to you with the question of his qualifications before you, his statement is the same. His attitude is the same. His ability, his qualifications are the same.

It has been said that he can subscribe to the oath which all of you have taken. Yes, I imagine, if asked he would hold up his hand and say, "I will support the Constitution of the United States and of the State of Georgia, and on all questions and measures which may come before me, I will conduct myself as will in my judgment be most conducive to the interest and prosperity of this State." He not only, perhaps would say, "I do," to that, but if called upon to do so, he would get before this microphone and repeat those words.

But I am reminded of the statement made by someone that what you do speaks so loud, I can't hear what you say.

Now, what has he done? He has subscribed to and stated that these are his views: "I (substituting for we), I am in sympathy with and support the men in this Country who are willing to respond to a military draft which would compel them to contribute their lives to the United States' aggression in Viet Nam in the name of the freedom we find so false in this Country."

[fol. 144] He has a right as an elected official, or as a private citizen to say that in his opinion the United States' participation in Viet Nam is aggressive and without right, and that we should get out of Viet Nam. He has that right, and I would be in defense of his right to say that it is aggressive if he wanted to, that he disagreed with it, that he abhorred it, that we should get out; as much as any other man, but that is not what he said.

"I am in sympathy with and support the men in this Country who are unwilling to respond to the military draft." He said on two occasions in public statements, and once here, that he is in sympathy with and supports those men who are willing to violate the unquestioned statute laws of the United States of America. He is in sympathy with and supports those persons who, in his own words, for any reason would deny their obligation and their duty to defend and protect this Country against its enemies.

It may well be that Mr. Bond does not feel that the Viet Cong, or that the Communists are the enemies of the United States. He has that right. If he does not feel that they are our enemies, he has that right; but as an elected public official, he has the obligation to support the statute laws of the United States, and to refuse to give aid and comfort to our enemies.

Is there a man among you who would deny that the statements such as this to which he subscribes give aid and [fol. 145] comfort to our enemies? Is there such a man

among you who would deny that the advocacy of the refusal of the American people to defend their shores is giving aid and comfort to their enemy? No.

Mr. Bond has a right to be tried for treason elsewhere, such is not the trial here; but whether or not he in fact subscribes to the Constitution of the United States, which specifically prohibits the giving of aid and comfort to our enemies, is what is before us here. Mr. Melton asked me if I was going to try and define aid and comfort to our enemies. I guess, Mr. Melton, that the question, or the definition would have to be in the form of a rhetorical question:

Is it aid and comfort to our enemies when we add strength to their position in opposition to us? Is it aid and comfort to your enemies when you sap the will of Americans to defend America? Is that aid and comfort? Is it aid and comfort as a public official to attempt to get people to violate the statute laws of this State?

I say it is, and I say that precludes him from being able to sincerely take the oath that is required by the Constitution.

He speaks it out of his own mouth, when asked the question, if we were at war on a technical basis, if he thought it would be treasonable to advocate that they avoid the draft and refused to respond to the draft; he said, "I would [fol. 146] have to think about it."

Is a man qualified to sit in this House who has to think about whether he would commit treason under a given circumstance?

About a hundred years ago, 98 years ago in this very chamber, there occurred a precedent that is sustaining of the position that we are taking here. In 1868, the Legislature of Georgia, duly elected by the people of this State was seated and sworn in, and Buckner Bulloch, the man for whom the County from which Jones Lane is from, or who bears the same name, served as its governor. They were sworn in and he notified the military governor that the Legislature was here and ready to do business.

That Legislature was subsequently adjourned by the military governor, and another one elected. After the adoption of the Constitution of 1868, Georgia had been readmitted to the Union, only on condition that it ratify the Fourteenth Amendment, and only on the condition that it repudiate the debt, the State war debt.

When that Legislature convened, Congress was notified and the military governor was notified that Georgia had complied with the terms of the Readmission Acts. They met in July in this hall, July the 9th, 1868, and for the first 13 days, addressed themselves to the question of the qualifications of some members, and the contest was on this basis. The people who had fought for the Confederate [fol. 147] States were permitted to be seated without question, upon taking the oath. But there were among them people who, prior to the War Between the States, had served in public office and had taken the oath similar to the one that is taken here, to uphold and defend the Constitution.

Those people had participated in the War Between the States on the side of the Confederacy. After the War, after the ratification of the Fourteenth Amendment, those people were again reelected to this body, this House of Representatives. And this House of Representatives said those people who once took the oath cannot now be seated because we do not believe them on oath. They stood in the well, even as he says he stands in the well, ready, willing and able to subscribe to the same oath as every other member. But this House of Representatives refused to seat at least eight of those members and declared a vacancy and another election.

That, gentlemen, was an interpretation that this House not only has the right, but the duty to judge whether a man, in fact, is taking an oath.

Not only that, the Congress of the United States, that same Legislature refused to adopt the Fifteenth Amend-

ment, which had not even been proposed when it had been declared that they were readmitted to the Union, and the Georgia delegation went to Congress, presented its credentials as being duly elected, presented themselves to hold up their hand that they would take the oath that every [fol. 148] other man took to support and defend the Constitution of the United States, and the Congress refused to seat the first member of the Georgia delegation to Congress, and we were a year without any representation, and they refused to seat them. Why? They refused to seat them because they said, "What you do speaks so loud, we can't hear what you say. We don't believe you when you take that oath."

Now, Gentlemen, all of that appears in the House Journal of 1868, and in McElrath on the Constitution of this State.

You are called upon not to judge this man for any reason whatsoever but whether or not you think that what he subscribes—when he subscribes to the oath of office there is evidence sufficient to justify you in concluding that that is an empty oath, and that he still subscribes to the proposition that those who are willing to give aid and comfort to their enemies have his endorsement, his encouragement, his eagerness and his urging.

No, don't decide this case based on whether Julian Bond agrees with whether or not we ought to be in Viet Nam. Don't decide it on that. He has got the right to disagree with that. Julian Bond has got the right to disagree with any policy of the United States or the State of Georgia, the County of Fulton, but Julian Bond or no one else in this body or out of it, who holds a public office, has got a right to say: "I advocate giving aid and comfort to my enemies, [fol. 149] and I refuse to apologize for such a stand or to retreat from such a stand."

Yes, the evidence is here. Do not be concerned concerning the enumeration and the answers and the threat of a Federal Court. We have stampeded by worrying about them.

When Lyndon Baines Johnson was first elected to the Senate, a certain district court down there in Texas found that some of his cohorts had stole the election in his behalf and refused to seat him. He appealed it. Judge Abe Fortas—this is the way he got on the Supreme Court of the United States—he appealed it to the Federal Circuit Court—I mean the Fifth Circuit Court of Appeals held in 170 Federal Second, Johnson against Stephenson, that the Federal Courts have no right to determine who shall be seated in the Senate of the United States, and whether or not the election was stolen. Lyndon Baines Johnson should be seated, and he was.

The Chairman: Two minutes, Mr. Groover.

Mr. Groover: Thank you, Mr. Speaker—Mr. Chairman.

Gentlemen, your courtesy and attention has been appreciated. The courtesy of the gentlemen on the opposite side has been appreciated. Do not gloss over the proposition of whether a man is qualified to govern you, me, and others by whether he disagrees. That is not the issue.

But remember the statements uttered from his own words: "I admire the courage of one who would violate, who has got the courage to violate a law of this land. I am [fol. 150] in sympathy with them and support them, and I don't know whether I would have the courage not to be guilty of treason if called upon to make such a decision."

Is such the composition of this body, or will such be the composition of this body?

Thank you.

The Chairman: Now, any member of the Committee that wishes to ask Mr. Bond a question, he will now rise and stand before the mike and if you have a question you wish to ask him, please raise your hand and address the question to Mr. Bond. Any member of the Committee.

Does any member wish to have?

(No response.)

The Chairman: No one wishes to ask him a question. Mr. Bond you may be seated.

Gentlemen, the House, by the way, is continued in recess indefinitely, so please stay here so you will know whenever the recess is up.

There is one of three reports that this Committee can bring back.

Before I say that, though, let me say this: That both the proponent and the respondent agreed to this hearing this afternoon at 2:30, this the 10th day of January, 1966. They agreed to have the hearing on this day at 2:30. Is there [fol. 151] any other witness that either the proponents or the respondent wishes to hear from?

(No response.)

The Chairman: No other witness that either wishes to hear from. All right, the Committee can bring back one of three reports.

It can bring back a report to seat Mr. Bond.

It can bring back a report to seat Mr. Bond with censure.

It can bring back a report to refuse to seat Mr. Bond.

The Chair recognizes the gentleman from the 4th Circuit.

Rep. Ware: Mr. Chairman, as I understand it, we are down to the point to where we will start writing our report or making the decision in this case, is that correct?

The Chairman: The gentleman is correct.

Rep. Ware: Due to the complexities of this situation, I move we go into executive session for the purpose of writing a report.

The Chairman: Does the attorney for either the Respondent or the Proponent object to that?

Mr. Groover: No, sir.

Mr. Moore: We have no objections to that.

The Chairman: The Committee will now retire to room [fol. 152] 340—341 instead of 340.

(Whereupon, the Committee went into executive session.)

The Speaker: All members take your seats. The floor will be cleared of everyone except those authorized to remain thereon, that is, the press, attaches of the House and

Senate, and the news media. Every other person please clear the floor now, with the exception of the attorneys for the parties.

If you are on the floor of this House, we don't want to embarrass anybody, but if you are on the floor of the House and don't have a legal pass. We do not want anybody on the floor of this House unless they are legally qualified to be on it, so please don't put us in a position to have to ask you to leave.

Now, if you are members of the family of the Legislator, you are part of the qualified members. I see some of the freshmen are running their wives off. That is a rule of the House that members of the family can stay as part of them.

A Committee report will be in here in a matter of about five minutes. The House is not reconvened and as soon as the Committee report is read, let me give you the procedure.

Anyone wishing to speak to the report, either for or against it, will be allowed to do so. Please come to the [fol. 153] Speaker's stand and give me your name. Then after everyone has spoken, either for or against the report, if there is any minority report filed, then the first person to sign the minority report will have, after the previous question is ordered, will have 20 minutes to present his case. He can take the whole 20 minutes himself, or divide it up into any parcels that he wants to to anyone else, or farm it all out.

Then under the Rules of the House, the Chairman of the Committee making the report has the last 20 minutes after the previous question is ordered, to make it himself. I happen to be the chairman of the Committee. I don't propose to make it myself. I can farm it out to anybody I want to, to speak to the report of the Committee, and we will wait and see what happens at that time, whether or not anybody speaks to it.

(Short pause.)

I want to commend everyone in the House, both on the main floor and in the gallery for the perfect behavior that

we have had. I want to commend you, and I want to thank you. The Chair appreciates it, and I don't anticipate any change in attitude or behavior of the people on the floor of this House or in the gallery at any other time while this proceeding is under way. Thank you again. I expect with the exception of the two governors' fight, we have stayed here longer on opening day than most anybody has here recently.

(Short pause.)

[fol. 154] The Speaker: All members please take your seats. Please alter conversation.

I call upon the gentleman from Carroll, Mr. Wiggins, to read the report of the Committee.

Doorkeepers, close all the doors, close all the doors and keep them closed. The Secretary to the Legislative Counsel will come in this door to the left and he can be ascorted in.

Close those doors and keep them closed, unless a legislator comes in, then let him give his credentials.

Mr. Wiggins, read the majority report and then the minority report.

Rep. Wiggins: The Special Committee appointed pursuant to House Resolution No. 7 conducted a hearing on January the 10th, 1966, beginning at 2:30 o'clock p.m., in the chamber of the House of Representatives, State Capitol on the matter of Petitions filed challenging and contesting the seating of Representative-Elect Julian Bond of the 136th District.

Based upon testimony and the evidence and documents before this Committee, the Committee recommends that Representative-Elect Julian Bond not be allowed to take the oath of office as a member of the House of Representatives, and that he not be seated as a member of the House of Representatives.

This 10th day of January, 1966,

Respectfully submitted, George L. Smith, Chairman; [fol. 155] William J. Wiggins, Secretary.

The Speaker: That is George T. Smith.

Rep. Wiggins: I beg your pardon, George T. Smith, Chairman.

The Speaker: He wouldn't sign it. I tried to get him to.

Rep. Wiggins: There is a minority report, which I will read:

The Special Committee appointed pursuant to House Resolution No. 7 conducted a hearing on January the 10th, 1966, beginning at 2:30 o'clock p.m., in the chamber of the House of Representatives, State Capitol on the matter of Petitions filed challenging and contesting the seating of Representative-Elect Julian Bond of the 136th District.

Based upon testimony and the evidence and documents before this Committee, the undersigned members of the Committee recommend that Representative-Elect Julian Bond be allowed to take the oath of office as a member of the House of Representatives and that he be seated as a member of the House of Representatives.

This 10th day of January, 1966,

Respectfully submitted.

The report is signed. The first signature, J. C. Daugherty, 134th District.

The Speaker: The Clerk will read the resolution.

[fol. 156] The Clerk: A Resolution from Mr. Smith of Grady, and Mr. Wiggins of the 32nd:

A resolution relative to the matter of the seating of Representative-Elect Julian Bond; and for other purposes.

Whereas, a special committee created pursuant to House Resolution No. 7 which was appointed for the purpose of holding a hearing on petitions challenging and contesting the seating of Representative-Elect Julian Bond of the 136th District has conducted a hearing in said matter; and

Whereas, said committee has submitted a report in which it is recommended that Representative-Elect Julian Bond not be allowed to take the oath of office as a Representative as a Representative of the House of Representatives and

that he not be seated as a member of the House of Representatives.

Now, therefore, be it resolved by the House of Representatives that the report of the aforesaid committee is hereby adopted and the recommendations contained therein shall be followed.

Be it further resolved that Representative-Elect Julian Bond shall not be allowed to take the oath of office as a member of the House of Representatives and that Representative-Elect Julian Bond shall not be seated as a member of the House of Representatives.

Be it further resolved that the Clerk of the House is hereby instructed to immediately transmit a copy of the [fol. 157] aforesaid report and a copy of this resolution to the Governor, to the Secretary of State and to Representative-Elect Julian Bond.

The Speaker: The Chair recognizes Mr. Busbee.

Rep. Busbee: Point of parliamentary inquiry.

The Speaker: State your point.

Rep. Busbee: In the event that a motion is made after the previous question, since the minority report has been filed, isn't it true that under Rule 184, you would have 20 minutes allowed for the proponents, and 20 minutes allowed for the opponents, with the person first signing the minority report designated that time?

The Speaker: He is correct, with the opponents having the first 20 minutes and they can divide it up any way they wish. That is the minority group. And then the majority report will have the closing 20 minutes after the previous question has been ordered, and they have indicated to me that they have divided up that time.

Is there objection to the previous question being ordered?

(No response.)

The Speaker: The Chair hears none. The previous question is ordered.

The Chair now recognizes—Which man wishes to speak first for the minority report?

[fol. 158] The Chair recognizes the gentleman from the 134th, Mr. Daugherty.

All members take your seats, now, and give the gentleman your undivided attention.

Rep. Daugherty: Mr. Chairman, and my fellow members of this Georgia General Assembly, and the Special Rules Committee.

I am J. C. Daugherty, elected from the 134th District of Fulton County, June 16th, 1965, to serve in the House of Representatives of the Georgia General Assembly. Let me first say that I served three years in World War II with 30 months in the Pacific Theater.

Let there be no doubt about my belief in the American Constitution, the Georgia Constitution and the laws promulgated thereto.

I believe in the Selective Service laws of this Country, and I want to say here immediately that I am delighted to be a member of this great and august body, the Georgia General Assembly.

A check of history shows that no Negro has served in the Georgia General Assembly in the House of Representatives since 1907. However, since that time, and during the period immediately following this period, this State has made momentous and great strides in its educational and industrial development. We have been fortunate in not being beset with the catastrophic and the chaotic events [fol. 159] that rendered Alabama, Virginia, Mississippi and Arkansas asunder and cost these states millions of dollars in lost revenue, potential industrial development, and consumer buying.

I sat and listened quietly and intently to the charges made against Julian Bond and the evidence adduced before the Special Committee, and I want to submit, gentlemen, that I have yet to clear in my own mind a sufficient preponderance of evidence uopn which an order refusing to seat Julian Bond could be based.

There is no question in my mind, gentlemen, that if this has been in a court of law but what a motion to dismiss the charges for failure on the part of the propounders to make out a prima facie case would have been sustained; and now I come to say that this is a deliberative body and to urge my colleagues to bear this in mind at every point as they decide this question.

All the statements set forth and attributed to one prospective member of this House of Representatives has created a situation as it now exists. I feel that the overall concern and consideration should address itself to protecting and preserving the image of this great State, and the integrity of this great body. I do not believe that the emphasis and the notoriety accorded this premise is called for, or that the charges are sufficient in terms of any near or clear present danger to the security of this nation, or [fol. 160] that any assertion made by Julian Bond or attributed to him went beyond permissible freedom of speech guaranteed by the Constitution of the United States set forth in the First Amendment.

We are charged, gentlemen, with the responsibility of administering the public treasury and are the watchdogs of the welfare of four million Georgians. When the word goes abroad that Julian Bond was not seated, there will be no discussion of any relevant cause, but there will be much said that will blacken and besmirch the reputation of this great State, and will make my service, your service, and the services of those who follow us in this great body less delightful than might have been.

I, therefore, urge this body to reverse the decision of the Special Rules Committee, and permit Julian Bond to take his seat as a duly elected Representative from the 134th District—the 136th District of Fulton County.

The Speaker: The next gentleman to speak to the minority report, the Chair recognizes the gentleman from the 135th, Mr. Brown.

Rep. Brown: Mr. Speaker, members of this historic body, by virtue of my belief in the principles of American

Democracy, including our system of fair play as outlined in the Federal and State Constitutions, I sincerely urge that you will give full consideration to the possible conse-
[fol. 161] quences of whatever action is to be taken here this afternoon.

Each of us has been elected to this body to make laws which are going to make for a framework wherein all Georgians can more fully participate in the greatest traditions of our nation in keeping with the spirit of the United States Constitution.

To unseat a member of this body on the grounds of a personal statement which appears not to be violative of any law, would be a grave step which could cripple the entire operations of this body for the 1966 session. Georgia has the potential of becoming a great State, a State wherein the full manpower force should be able to develop to its maximum without the regard to race, creed or color. However, the realization of this greatness shall be delayed once again if we act without due cause in not seating our fellow Representative, Julian Bond.

Thank you.

The Speaker: Who is the next one?

The Chair recognizes the gentleman from the 133rd, Mr. Alexander.

Rep. Alexander: Mr. Speaker, fellow Representatives, ladies and gentlemen, I am William H. Alexander of the 133rd House District.

I would like to say in the beginning that I too am a veteran of the United States Army, having served abroad, and [fol. 162] I too believe in the laws of the United States and the laws of this State.

The pros and cons of this issue with which we are faced have been discussed in great detail, and time does not permit us to here discuss again all of the issues that we discussed in the Committee, but it is my sincere feeling that there is absolutely no evidence to support the report which has been brought in by the majority of the members of the Special Committee.

Firstly, there has been a violation of no law. No one has cited any law which the Representative-Elect is supposed to have violated.

There is a very serious constitutional question dealing with free speech, and I think that argument has been very ably made by counsel and I need not repeat it here. There were certain procedural irregularities in the whole hearing held here today, particularly with reference to the admission of the tape, and I need not take time to recapitulate all of the arguments made by counsel in reference to those procedural arguments, but I am in agreement with those arguments.

As has been stated, the eyes of the world are upon this body now, and will be tomorrow. It is my sincere hope that members of the House will think seriously before they vote on this issue, and will not vote to adopt the majority [fol. 163] report, but will vote to adopt the minority report, and finally, I wish to say, even if we assume, and I don't assume; but even if we did assume that the Representative-Elect has been guilty of breaching some rule or regulation, certainly the action recommended by the majority is far too severe. I do not think that he has violated any law.

I think he should be seated, and I urge the members of this delegation to give this matter due consideration, and vote to reject the majority report, and vote to adopt the report which has been signed by three members of the Committee as a minority report, namely, a report to seat the Representative-Elect.

Thank you.

The Speaker: Who wishes to be the next speaker to the minority report?

(No response.)

The Speaker: No other speakers, that is all.

The Chair recognizes the gentleman from the 64th, Mr. Lane.

Rep. Lane: Today we are engaged in armed conflict in South Viet Nam. American men and women of all colors are actively engaged in this conflict and are being killed and

wounded. We know from reading the newspapers throughout the year of 1965 American fighting men have been greatly upset and discouraged by the attitude taken by cer- [fol. 164] tain groups in this Country. They ask no more than we sustain their efforts and no less.

We further know that statements such as those that have been made by Mr. Bond and condoned by him have received great fanfare in Communist China and North Viet Nam. We know that war is not only won by the amount of explosion and death, but also the attitude of the people.

I feel and I believe that you feel that statements such as the one condoned by Mr. Bond give our enemies both the armed forces and the civilian population a feeling that they are right, and further encourages them to sacrifice for what I believe to be an unholy cause.

The Constitution of the United States and the Constitution of the State of Georgia define treason, and you have read and you have heard the discussions early today. There is one significant portion of the treason statute which we are concerned with, and that is the portion that says anyone who gives aid or comfort to the enemies of the United States or the enemies of the State of Georgia is guilty of treason.

I know of no fundamental right than that of free speech. Many of you and yours have sacrificed themselves in defense of our country. This is an obligation of citizenship. I ask you, can you in all consciousness of the men that you know in Viet Nam, say to them that we condone a member [fol. 165] of the Georgia Representatives whose feelings seem to be that he does not only support, but has aligned himself against them in the field of conflict?

I further ask you one other question: Do you feel that the people of your district and the people of Georgia want you to condone one who has departed from the responsibility of citizenship and his responsibility of being a government official?

Mr. Justice Holmes once said that even freedom of speech must be tempered and that no man has the right to yell "fire" in a crowded theater when in fact there is no fire.

Pursuant to lawful authority, the President of the United States is authorized to commit the armed forces of this Country thrughout the world for the protection of freedom and self government. As long as this authority exists, no defiance should be made or tolerated relative to this authority. It is my sincere belief, and, I am sure, the belief of my colleagues that in order for the citizens of this sovereign State to have confidence in this legislative body, that we are obligated to refuse to seat Representative Bond.

I thank you.

The Speaker: The Chair recognized the gentleman from the 97th.

Rep. Patford: Ladies and Gentlemen of the House, the [fol. 166] events of the past now sadden us. We find ourselves now involved in a problem which challenges the dignity of the House, in which we sit, for there is blood that runs down the trenches in a far-off land, that causes tears to run down mothers' cheeks whose sons have perished, to run down widows' and children's faces whose husbands and fathers made the supreme sacrifice for a freedom that we all enjoy. And yet, there are those in this land that love not country more than self, and advocate doctrines that ring at the very heart of our nation itself.

Usually these creatures are far, far away from this land of beautiful rivers, great cities, pine forests, fresh air and pleasant living known as Georgia, but now we find not only our State, our counties, but the Legislature itself have been invaded by one whose "SNCCing" pursues not freedom for us but victory for our enemies.

But ladies and gentlemen of this house, the issue that whether he be with us or not is not what plagues me most, but what tears at my soul is that his chair was emptied by a court edict which threatens to tear at the very heart of his nation as founded by our forefathers; for many great and noble Georgians whose service in this hall has bettered our State and led it to unprecedented heights of prosperity and advencement are gone. These men were God-fearing men, law abiding, respecting men, whose respect and loyalty to country and law led many of them to support the very

[fol. 167] measure that resulted in the termination of their services here.

Yes, gentlemen, I regret to say that reapportionment ousted such noble and distinguished statesmen as Fred Walker, George Brooks, Henry Milhollen, Frank Branch, Waldo Henderson, Jack Knight, Grover Lee, and many other men like them, and has shoved in their stead that this State might see darkness instead of light, the infamous Mr. Bond.

The dismay of those who proposed reapportionment might lead them now to pray that things might be as in the past when capable, sincere, conscientious patriarchs watched over and carefully perfected the decisions that were made in these halls. But I suggest that their prayers be for themselves and this body, that someday our accomplishments might contain the integrity, the ability, the wisdom and the foresight of the men whose knowledge guided these halls for over a century and a half; and the wisdom of our forefathers has served us well, and there are those among us who wait to see if the courts can be as wise. Certainly up to now, we can only say the courts' decisions have been chaotic at best.

The Speaker: The Chair recognizes the gentleman from the 21st.

Rep. Bagby: Mr. Speaker, ladies and gentlemen of the House, I approach the well of the House tonight with more apprehension in my heart and in my mind than in all the [fol. 168] years of experience that I have had here.

This is a serious matter. I have worried about it all day long. I feel that I must support the majority report, and I do so with this apprehension: That I have been boxed and I have been put in a trap by a militant organization whose designs upon this Country are not for the best interest of the people of Georgia.

I feel that this situation that has arisen here today was a planned thing, and that we are being used. SNCC is in debt. They are in the hole, they are in a rough spot. Well, we are fixing to give them a martyr, and we are fixing to give them a cause.

Well, I want them to know, wherever the SNCCs are today and tonight, that I know I am being used, you ain't fooling me a darn bit. I know that I could not go home and face my people knowing that some of my constituents are tonight fighting on foreign soil to carry on the things that you and I fought for in World War II.

No, sir, we don't need you, Mr. Bond.

And I say to you, gentlemen, I have no compunction whatever about not seating Mr. Bond, because I do not think that he is entitled to his seat because of the assertions he has made and the positions he has taken against the government of the United States.

Thank God we live on the face of the greatest country [fol. 169] on the face of God's green earth, and I could not sleep with myself, I could not stand myself tomorrow morning when I look in the mirror; if every member in this House wanted to seat him, I could not do so.

I realize that we are giving them a cause when we do what we are doing, but that is the path that you and I must take, support the majority report, and let's do what we think is right.

The Speaker: The vote will now be taken. It will take 103 votes to uphold the report.

The Chair recognizes the gentleman from the 70th.

Rep. Floyd: Mr. Speaker, in fairness to Mr. Julian Bond and to the members of this House, I would like to make the following request: That the people that belong to the newsmedia get where they are supposed to be; that the wives and kinfolks and cousins and the Senators and everybody else leave the floor of this House, and no one be allowed to sit in a seat except the members of the General Assembly and that Rule 200 be read.

The Speaker: Read Rule 200.

The Clerk: Rule 200: No member or person shall vote for or attempt to vote for another member on any question or proposition. Violation of this rule shall be deemed to be disorderly behavior and subject to punishment as provided by the Constitution and rules of the House.

[fol. 170] The Speaker: I want to say this. I think in fairness to the parties involved on both sides that counsel will be able to stay in and sit beside them. I meant to state that in my opening remarks, and I think everyone else should leave the floor except those involved.

Shall this resolution now pass?

Any objections?

(No response.)

The Speaker: Hearing none, the main question, all in favor of adopting the resolution, which is supporting the recommendation of the Special Committee, unfavorable to the seating of Mr. Bond, vote aye. Those opposed vote no.

The Clerk will unlock the machine.

All members go to one side or the other.

All members voted? All members voted?

The Clerk will lock the machine, on adoption of the resolution, the Clerk will lock the machine.

On adoption of the resolution, the Ayes, 184; the Nays are 12.

The resolution is adopted.

The Chair recognizes the gentleman from Dougherty.

Rep. Burt: Mr. Speaker, I move that this House do now adjourn until 10:00 o'clock tomorrow morning.

The Speaker: Doorkeepers, close the doors and keep them closed.

[fol. 171] All in favor of the gentleman's motion that this House now adjourn until 10:00 o'clock tomorrow morning say aye.

(Whereupon, there was a chorus of ayes.)

The Speaker: All opposed say no.

(Whereupon, there was a chorus of noes.)

The Speaker: The ayes seem to have it, and the ayes do have it. This House is now adjourned until 10:00 o'clock tomorrow morning.

(Whereupon, the above-entitled hearing was concluded.)

CERTIFICATE

Georgia
Fulton County

I, J. Bruce Welch, being a Notary Public in and for the State of Georgia at Large, do hereby certify that the above and foregoing is a true and complete transcription of my stenographic notes taken at the hereinabove set out time and place and was reduced to typewriting by me personally.

I further certify that I am neither of kin nor counsel to any of the parties hereto, nor financially interested in the matter.

Witness my hand and official seal at Atlanta, Fulton County, Georgia, this the 12th day of January, 1966.

J. Bruce Welch, Notary Public, Georgia State at Large, My Commission Expires Oct. 12, 1968. (Seal).

[fol. 173]

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

Civil Action No. 9895

[Title omitted]

ORDER APPOINTING THREE-JUDGE COURT—January 17, 1966

The Honorable Lewis R. Morgan, Chief Judge of the United States District Court for the Northern District of Georgia, to whom an application for injunction and other relief has been presented in the above styled and numbered cause, having notified me that the action is one required by act of Congress to be heard and determined by a district court of three judges, and, it appearing that one

[File endorsement omitted]

basis for relief urged by the plaintiffs is that the challenged conduct is in violation of an earlier order of the statutory three judge court consisting of the Honorable Griffin B. Bell, United States Circuit Judge, the Honorable Lewis R. Morgan, United States District Judge, and the undersigned, in Toombs, et al. v. Fortson, et al. (N.D. Ga.) 241 F. Supp. 65, I, Elbert P. Tuttle, Chief Judge of the Fifth Circuit, hearby designate myself, Elbert P. Tuttle, United States Circuit Judge, and the Honorable Griffin B. Bell, United States Circuit Judge, to serve with Judge Morgan as members of, and with him to constitute, the said Court to hear and determine the action.

Witness my hand this 17th day of January, 1966.

Elbert P. Tuttle, Chief Judge, Fifth Circuit.

[fol. 174]

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

Civil Action No. 9895

[Title omitted]

ORDER OF THREE-JUDGE COURT SETTING UP PRE-TRIAL HEARING—January 17, 1966

The motion for interlocutory injunction shall be heard in the District Courtroom in the United States Courthouse, Atlanta, Georgia, at 9:30 A.M. on January 28, 1966.

The parties shall, prior to 12 o'clock Noon, on Friday, January 21st, make every effort to stipulate the facts essential to a determination of the issues in the case. Such stipulation shall be filed in the Clerk's office by 12 o'clock Noon, January 21st.

A pre-trial hearing will be held by one or more of the members of this court in the said courtroom at 9:30 A.M. on Monday, January 24th, to determine the issues to be

[File endorsement omitted]

submitted upon the trial and to prescribe the time for filing trial briefs by the parties.

This 17th day of January, 1966.

Elbert P. Tuttle, Circuit Judge, Griffin B. Bell, Circuit Judge, Lewis R. Morgan, District Judge.

[fol. 174a] Rec'd order for Atty. Gen. 1/17/66, Leroy Elliott

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[fol. 175]

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

[Title omitted]

Civil Action No. 9895

MOTION TO STRIKE PARTIES PLAINTIFF FOR LACK OF STANDING

—Filed January 21, 1966

Part One

Now come the Defendants named in the above-styled case and before answering move to strike Dr. Martin Luther King, Jr. as a Party Plaintiff for the following reasons:

(a) Said Plaintiff has failed to state a justiciable case in that he was not qualified to vote in House District tiff and Defendants.

(b) Said Plaintiff is not a proper party in this case even if there was some controversy in that he has no standing with respect to the acts complained of in that he was not quaified to vote in House District Number 136 at any time material to this cause.

Part Two

Now come the Defendants named in the above-styled case and before answering move to strike Mrs. Arel Keyes as a Party Plaintiff for the following reasons:

[File endorsement omitted]

(a) Said Plaintiff has failed to state a justiciable case in that there is no controversy between said Plaintiff and Defendants.

[fol. 176] Wherefore, Defendants pray that

(a) The motion to strike Dr. Martin Luther King, Jr. be inquired into and sustained.

(b) The motion to strike Mrs. Arel Keyes be inquired into and sustained.

Arthur K. Bolton, The Attorney General; William L. Harper, Assistant Attorney General; Alfred L. Evans, Jr., Assistant Attorney General; Peyton S. Hawes, Jr., Assistant Attorney General; Paul L. Hanes, Assistant Attorney General.

132 State Judicial Building Atlanta, Georgia 30334.

[fol. 177] Certificate of Service (omitted in printing).

[fol. 178]

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

Civil Action No. 9895

[Title omitted]

[fol. 179]

STIPULATION OF FACTS—Filed January 21, 1966

It is hereby stipulated, by and between the parties herein, acting through their counsel of record, that the facts hereinafter set forth shall be accepted as true on the trial of this case, and it shall not be necessary to introduce any further evidence with respect thereto. However, either party may introduce relevant evidence not inconsistent herewith. This stipulation does not, however, constitute an agreement as to the relevancy of any fact stipulated.

The facts herein stipulated apply fully to all periods of

[File endorsement omitted]

time in question except where the context or dates stated indicate otherwise.

It is agreed and stipulated that the court may decide all questions of law and fact on the basis of this stipulation and such other evidence as may be introduced.

1.

It is agreed that the figures "1971(2)", as appear on lines six (6) and eight (8) of Paragraph No. 1, be changed to the figures "1971".

2.

It is agreed that the allegations contained in Paragraph No. 3 to the effect that Julian Bond and Mrs. Arel Keyes are Negro citizens of Fulton County, Georgia, House District No. 136, and are registered voters over the age of twenty-one (21) year are correct, and it is further agreed that Julian Bond and Dr. Martin Luther King, Jr., are men and Mrs. Arel Keyes is a woman. As to Dr. Martin Luther King, Jr., it is further stipulated that he was not qualified to vote in House District No. 136 prior to June 16, 1965.

[fol. 180]

3.

As to Paragraph No. 4, first sub-paragraph, it is agreed that Defendants James "Sloppy" Floyd, Wm. J. (Bill) Lee, Ed T. Fulford, J. Terrell Webb, David L. Newton and W. Jones Lane are white males over the age of twenty-one (21) years, are residents of the State of Georgia, and are duly elected and serving members of the House of Representatives of the State of Georgia. No stipulation is made as to the remaining two sentences in the first sub-paragraph of Paragraph No. 4.

As to sub-paragraph 2, Paragraph No. 4, it is agreed that George T. Smith is the duly elected and qualified Speaker of the Georgia House of Representatives, is Chairman of the Rules Committee of said House, and was Chairman of the Special Committee created by House

Resolution No. 7, which Committee was created for the purpose of holding a hearing on petitions challenging and contesting the seating of Representative-Elect Julian Bond from the 136th District.

As to sub-paragraph 3, Paragraph No. 4, it is agreed that Defendant Glenn Ellard is the Clerk of said House.

As to sub-paragraph 4, Paragraph No. 4, it is agreed that Defendant Maddox Hale is the Speaker Pro-Tem of said House.

As to sub-paragraph 5, Paragraph No. 4, it is agreed that David Peeples is Doorkeeper of said House.

[fol. 181] As to sub-paragraph 6, Paragraph No. 4, it is agreed that Defendant Ben W. Fortson, Jr., is the Secretary of the State of Georgia and is charged with the duty of issuing commissions to the members of said House.

It is hereby stipulated that Jack Tyson is the Sheriff of the House of Representatives of the State of Georgia and that he may be considered as a party Defendant in this case.

4.

As to Paragraph No. 5, it is agreed that all Defendants are residents of the State of Georgia, that Defendant Wm. J. (Bill) Lee resides in Clayton County, Georgia, and that all Defendants may be served at the State Capitol, Atlanta, Georgia.

5.

As to Paragraph No. 6, it is agreed that Julian Bond was duly elected to said House on June 16, 1965, and that the Special Democratic Primary Election was held May 5, 1965, but no other stipulation is made concerning said Paragraph.

6.

As to Paragraph No. 7, it is agreed that Mr. Bond received the Democratic nomination, running against one opponent who was also a member of the Negro race; that

Mr. Bond received 1,243 votes, and his opponent, Rev. Howard Creecy, Sr., received 522 votes; that Mr. Bond had Republican opposition in the Special Election held June 16, 1965, and that his opponent at that time was Malcolm J. Dean, also a member of the Negro race, and Mr. Bond received 2,320 votes, and Mr. Dean received 487 [fol. 182] votes, Mr. Bond receiving eighty-two percent (82%) of the total votes cast in said election. It is further agreed that, of approximately 6500 registered voters in the 136th District, 6000 are members of the Negro race.

As to the remainder of Paragraph No. 7, it is agreed that Mrs. Arel Keyes is a constituent of Mr. Bond; that Mrs. Keyes resided in House District No. 136 and voted in both the Primary and Special Elections above referred to, and that in such elections she cast her ballot for Mr. Bond.

7.

As to Paragraph No. 8, it is agreed that on Thursday, January 6, 1966, the Student Non-Violent Coordinating Committee, of which Mr. Bond is a member and an employee, issued a statement critical of American policy with respect to Viet Nam, and with respect to the civil rights of Negroes in the United States, and it is further agreed that Mr. Bond made other statements in addition to these which are set forth in the transcript of the proceedings before the Challenge Committee created by said House and in the tape recordings of his conversation admitted in evidence before such Committee, but Plaintiff does not agree that such evidence was properly admitted. It is agreed that Exhibit A to Exhibit A in the Complaint is a true and correct copy of the statement issued by the Student Non-Violent Coordinating Committee. It is further agreed that the statements made by Mr. Bond were widely reported in the Georgia press and other news media, but no further stipulation is made concerning said Paragraph.

[fol. 183] 8.

As to Paragraph No. 9, it is agreed that on Monday, January 10, 1966, said Secretary of State transmitted his certification that Mr. Bond was the duly elected Representative for House District No. 136 to said House; that five (5) petitions contesting Mr. Bond's right to be seated were filed; that the hearing concerning the seating of Mr. Bond was held pursuant to two (2) such petitions, which are correctly set forth as Exhibits A and B.

It is further agreed that Exhibit E, referred to in the sixth sentence of said Paragraph No. 9, is a true and correct copy of House Rule 198; that seventy-four (74) of the seventy-five (75) members who signed one or both of the petitions attached as Exhibits A and B, remained in the House and voted on House Resolution No. 19.

No further stipulation is made as to said Paragraph No. 9.

9.

As to Paragraph No. 11, it is agreed that the hearing before the Special Committee was held in the Chamber of said House, and that a great number of the members of the House remained in the Chamber during said hearing as well as the general public.

It is further agreed that the transcript of the proceedings attached as Exhibit D, with the exception of minor errors which will be called to the Court's attention, is a true and correct transcription of the proceedings before the House, with the exception of the radio tapes, which have been transcribed and are attached hereto.

[fol. 184] 10.

As to Paragraphs No. 18, 20, 22, 24, 26, 28, 30, 32, 34, 36 and 38, it is agreed that all of said Paragraphs shall read as follows: "Plaintiffs re-allege Paragraphs No. 1 through 13, inclusive, and Paragraph No. 16, in their entirety."

11.

As to Paragraphs No. 29, 37 and 39, it is agreed that the words and figures "House Rule 19", shall read "House Resolution 19".

12.

It is agreed that Exhibit A and the Exhibit A to Exhibit A, Exhibits B, C, D, E, F, G and H are true and correct copies of that which they purport to represent; that Exhibit F is a true and correct copy of the Roll Call Vote on House Resolution 19, and that Exhibit H is a true and correct copy of the text of a telegram which was sent to the persons therein designated.

13.

It is agreed that Exhibit One attached hereto is a true and correct copy of the Majority Report filed by the Special Challenge Committee of said House, and that Exhibit Two attached hereto is a correct copy of the Minority Report filed by said Committee of said House.

14.

It is agreed that eight (8) members of the Negro race were elected to the Georgia House of Representatives in [fol. 185] the Special Election hereinbefore set out, and that their names and Districts from which they were elected are as follows:

John Hood	District 124
Rev. J. D. Grier, Jr.	District 132
William H. Alexander	District 133
J. C. Daugherty	District 134
Benjamin D. Brown	District 135
Julian Bond	District 136
Grace T. Hamilton	District 137
Albert W. Thompson	District 110

It is further agreed that, with the exception of Mr. Bond, all of the above named members of the Negro race were seated in and are now serving in said House. It is further agreed that the Georgia Senate includes two (2) members of the Negro race who were duly elected and seated in that body.

It is further agreed that two (2) members of the Special Challenge Committee were members of the Negro race, and that the other members of said Committee were members of the white race, and it is agreed that two (2) members of the Negro race and one (1) member of the white race, a Representative from Fulton County, Georgia, signed the Minority Report hereinbefore set out.

15.

It is agreed that parties hereto will provide notice to the opposing party of any witness called, and that such notice shall be given at least by ten o'clock A. M., January 27, 1966.

16.

It is agreed that Exhibit Three, attached hereto, is a true and correct transcript of the first taped conversation [fol. 186] played before the Special Challenge Committee of said House, and further, that Exhibit Four, attached hereto, is a true and correct transcript of the second taped conversation played before said Committee in said House. This stipulation does not preclude the actual introduction of the taped conversation played before the Special Challenge Committee of the House of Representatives.

17.

It is hereby agreed that Exhibit Five, attached hereto, is a true and correct copy of the roster of those elected to the General Assembly of Georgia for the January 1966 Session, as prepared by Ben W. Fortson, Jr., Secretary

of State, and that the information contained in Exhibit Five is true and correct.

Respectfully submitted,

Arthur K. Bolton, Attorney General; William L. Harper, Assistant Attorney General; Alfred L. Evans, Jr., Assistant Attorney General; Peyton S. Hawes, Jr., Assistant Attorney General; Paul L. Hanes, Assistant Attorney General, Attorneys for defendants.

P. O. Address: 132 Judicial Building, 40 Capitol Square, Atlanta, Georgia, 30334; 525-0401.

Howard Moore, Jr., Attorney for Plaintiffs.
859½ Hunter St., S.W., Atlanta, Georgia.

[fol. 189]

PLAINTIFFS' EXHIBIT 3

Case No. 9895—Admitted Jan. 28, 1966

First Part

TRANSCRIPT OF PROTESTANT'S EXHIBIT No. 1

Q. "... [P]ersons in the Civil Rights movement avoid the draft in order to continue their work to assure the rights of Negroes . . .", etc. That's what I'm quoting from the AP story, so what would be your reaction? Julian, this is Ed Spivia. I was there at the Press Conference called by John Lewis—

A. Uh, huh.

Q. And Lewis was questioned by newsmen as to whether or not you endorse this release today, and I would like to ask that question to you now. Do you endorse the release made by the SNCC Group today?

A. Yes, I do.

Q. Would you say that again, please?

A. I said, "Yes, I do."

Q. Now, could you qualify, Julian, why specifically you do endorse it and what points?

A. Why, I endorse it, first, because I like to think of myself as a pacifist and one who opposes that war and any other war and eager and anxious to encourage people not to partcipate in it for any reason that they choose; and secondly, I agree with this statement because of the reason set forth in it—because I think it is sorta hypocritical for us to maintain that we are fighting for liberty in other places and we are not guaranteeing liberty to citizens inside the continental United States.

Q. Julian, do you feel that you can endorse this statement and effectively set out the duties of your office that you have been elected to?

A. Well, the qualifications for being a legislator in Georgia—that you be over 21 years old, be a resident of the State for more than two years and not be a member of the Communist Party, and I meet all of those qualifications.

Q. Julian,—?

[fol. 189a] A. And, uh—. Yeah?

Q. I'm not speaking of it in that manner. You have an oath to take come Monday. Will you be able to take this oath with a clear conscience and endorse this statement?

A. What does the oath require? That you uphold the Constitution of the State of Georgia and the Constitution of the United States of America, right?

Reporter: That's correct.

A. Right, Well, I don't see anything in this statement that conflicts with that.

Q. Now, you started to say, Julian, to start off with before you were interrupted about the oath, what the oath requires, and why you feel that a—if you could just sum all that up in a statement.

A. Well, I said the qualifications—not speaking about the oath—but the qualifications for being a State Representative in Georgia require that you be at least 21 years old, a two-year, I think, resident of the district from which

you are elected, and not be a member of the Communist Party, and I meet all of those qualifications, and consider myself just as qualified as any other member of the Georgia House of Representatives, and just as able, if not more able, to perform my duties as are the other members.

Q. Well now, of course according to what you have just given us, and I'm sure that's quite correct—that much of it is spelled out. But you don't feel that there are certain, perhaps moral obligations that are implied in taking over such an office as you expect to do which might be in variance with this view you've just stated?

A. Well, I think that the fact that the United States Government fights a war in Viet Nam, I don't think that I as a second class citizen of the United States have a requirement to support that war. I think my responsibility is to oppose things that I think are wrong if they are in Viet Nam or New York, or Chicago, or Atlanta, or wherever.

Q. Julian, the only thing that's keeping the group that has made this statement from being in treason is the techni-
[fol. 189b] cality that we aren't at war. If we should become engaged in war and a declaration of war be declared, would you still stand by this statement?

A. Well, I don't know. That puts a different light on it, but one of the many reasons that I oppose the war in Viet Nam is because it seems to me that if we are at war and we are at war declared, not by Congress as wars are supposed to be declared, but war declared by President Johnson, and there seems to me that there is something wrong with that sort of a situation and that is one of the many reason why I oppose that war.

Q. In other words, you are willing to stand by this as long as it doesn't cost you anything, but if it's going to cost you—you are going to be held in treason—then you can't stand by it.

A. Well, I have to think about it again. I don't know. I don't know if I'm—if I—you know, if I'm strong enough to place myself in a position where I'd be guilty of treason.

Right now, I stand by it, and—if it were treasonable by law I'd have to think about it again.

Q. Well, you were elected by all the people to represent those people. Do you feel that all the folks that voted for you have these same views? Or the majority of them?

A. No, I don't know what the majority opinion is among my constituents about the war in Viet Nam. I imagine and this is without knowing, I imagine that they oppose it, because I remember being at the bus station in Atlanta and seeing a bus load of draftees getting ready to leave for Fort Benning, I think, and a Negro youngster jumped off and said to the Sergeant who was loading them on the bus, "You didn't want us to go to school with you, you didn't want us to sit at lunch counters with you and now you want us to go overseas and fight and die with you." And this kid wasn't intending to go, but they got him back on the bus and he went, and I think that without knowing, without having taken a poll, that that would be an opinion [fol. 189c] among a great many people that I represent.

Q. Now, Julian, you don't feel that apparently from what you stated as other top officials have stated, Governor Sanders among them, who have actually gone over to Viet Nam and talked to all levels of people over there from the top military down unto the lowliest peasant of Viet Nam and also of course to their own fighting men, that if we do not stop Communism there that it is just a question of where will we stop it next, and that eventually that they would come over and take over this country. This is their avowed aim, and that if they did I don't think there is very much doubt in many peoples' minds but not none of us including yourself who apparently disagree with our current policy would be able to voice such an expression of disagreement, and, in addition, to actively advocate avoidance of the draft—this still does not—you don't feel would change your mind in this area?

A. Oh, no, I'm not taking a stand against stopping World Communism, and I'm not taking a stand in favor of the Viet Cong. What I'm saying that is, first, that I don't

believe in that war. That particular war. I'm against all war. I'm against that war in particular, and I don't think people ought to participate in it. Because I'm against war, I'm against the draft. I think that other countries in the World get along without a draft—England is one—and I don't see why we couldn't, too.

Q. You don't think this is what would be necessary in order to fight this war in order to stop Communism from going any further?

A. Well, I'm not convinced that that is really what's going on, but I'm not prepared to argue it. You see, I don't want to say anything about that. I'm not convinced that we are really stopping International Communism. I like—not completely—but I like fairly well, the life I live now. You know, I don't want too many abrupt changes in a direction I don't like take place, but I'm not about to justify that war, because it's stopping International Com- [fol. 189d] munism, or whatever—you know, I just happen to have a basic disagreement with wars for whatever reason they are fought—

Q. Don't you—

A. . . . [F]ought to stop International Communism, to promote International Communism, or for whatever reason. I oppose the Viet Cong fighting in Viet Nam as much as I oppose the United States fighting in Viet Nam. I happen to live in the United States. If I lived in North Viet Nam I might not have the same sort of freedom of expression, but it happens that I live here—not there.

Q. Julian, this is Mike. Dick, let me say something to you. I happened to overhear those questions, and I don't think you should use his answers to them. Number one, because Senators and Congressmen who have taken the same oath as he will have to take only on a much larger scale have said the Administration is wrong, so I don't see how you can justify asking him questions about that, and I don't think they should be used.

A. Thank you. Well, it is sorta unfair to suggest that it is my opposition to the war—my opposition to the war

is somehow different from the opposition say—uh, of Senator Russell, a little while ago—not presently—but a little while ago, who said he didn't think American boys should be losing their lives to fight in Viet Nam. You see, and if I'm approaching treason in my statements, then perhaps he is, also.

Q. Well, I realize that you wouldn't come out and say that, you know, as long as a newsman is questioning you. You don't want to take the position of being adamantly opposed to questions, so I thought I'd break in and say that.

A. Thank you.

Mike Jones: Okay.

Dick Grey: Of course, Mike, you realize all those questions weren't mine—so anyway, I do take into consideration and have from the start—this wasn't obvious, but I should . . .

[fol. 189e]

PLAINTIFFS' EXHIBIT 4

Second Part

TRANSCRIPT OF PROTESTANT'S EXHIBIT No. 2

(Interview with Bond in the hallway immediately after other members were given oath and he was not)

Mr. Bond: Please Committee Members, ask me the questions.

Spokesman: Please repeat.

A. . . . [T]he message to my constituents, it goes:

"There has been during the past few days a great deal of public discussion about me, my right to serve in the Georgia House of Representatives, and my right to speak my mind. I stand here as a citizen elected by other citizens to a seat in the Georgia House of Representatives. I stand before you today charged with entering into public discussion on matters of National interest. I hesitate to offer

explanations for my actions or deeds where no charge has been levied against me other than the charge that I have chosen to speak my mind and no explanation is called for, for no member of this House, has ever, to my knowledge, been called upon to explain his public statements for public postures as a prerequisite to admission to that Body. I therefore, offer to my constituents a statement of my views. I have not counselled burning draft cards, nor have I burned mine. I have suggested that congressionally outlined alternatives to military service be extended to building democracy at home. The posture of my life for the past five years has been calculated to give Negroes the ability to participate in formulation of public policies. The fact of my election to public office does not lessen my duty or desire to express my opinions even when they differ from those held by others. As to the current controversy because of convictions that I have arrived at through examination of my conscience I have decided I personally cannot participate in war."

[fol. 189f] I stand here with intentions to take an oath —that oath they just took in there—that will dispel any doubts about my convictions or loyalty.

Q. Do you think the Committee will clear you, Representative Bond, for your seat? Are you confident of this?

A. I don't know what they will do.

Q. Do you still stand by the SNCC statement that you endorsed earlier?

A. I do.

Q. What do you think the Committee will do now knowing the tenor of this legislative group? Do you think you will be seated? Are you confident of it?

A. I have—listen, 82 percent of the people who voted in the election in my district voted for me, and more people voted on election day in my district proportionate to the numbers of voters than voted in any other district in any place in this whole State, and those people elected me to represent them there, and I'm going to represent them.

Q. If you are defeated, what will you do? What action will you take, Mr. Bond, if you are not seated?

A. I don't know. I'm—it's not a case of being not seated—I'm going to be seated. I mean it's not a case—

Q. Will you go to court?

A. Well, I've got my lawyer here.

Q. Will you give us a statement on that, Sir?

A. We intend to fight in every form that's available. We intend to fight before the Rules Committee. We take the position that the Clerk of the House of Representatives has no authority to request a duly elected member of the House of Representatives to step aside. That the Clerk's authority is limited solely to the organization of the House—not to the composition of the House, and we think that's a meaningful distinction and we are going to push it. We also take the position that the Rules Committee has no [fol. 189g] authority to inquire into a member's views—his attitudes, that not only do you have to get elected in Georgia and be a citizen of the State, a resident in the county but now you have to have the correct attitude. We resent that. We will go into court and I am authorized by persons from his district to file suit if need be. I am authorized by Mr. Bond to proceed before the Rules Committee if need be. We will proceed most vigorously and fight in every form that's available.

Q. Mr. Bond, was this a deliberate move by SNCC to make a martyr out of you and create a National issue?

A. Let me introduce you to Mr. Forman who is the Executive Secretary of SNCC. Let me say something else before I introduce him. Two years ago—see I came up here—right upstairs there to see if I could get a chance to see what goes on in this Body and they put me out because of the color of my skin, and we came down here right out in this hall and somebody who said he was a member of this House pushed and shoved me and punched Forman in the chest, and now they put me out again because they say they don't like my attitude. But anyway, I just wanted to say that.

Q. What do you have to say about it, Mr. Forman?

A. I just think it's utterly outragious that a man who's elected by 80 percent of the voters in his district cannot now sit duly elected. I think that it's a deprivation of those constitutional rights. I think that it is a racist act because the people from his district are Negroes and that he's a Negro, and that now it is not even a question, the Sixty-Five Civil Rights Act is meaningless if you give Negroes the right to vote and if they in fact elect who they want to elect, and then a racist legislature like the Georgia Legislature will not allow a man to take his oath of office. And he's absolutely right, two years ago we stood on this same wing—right here at that door when a Legislator pushed him and he shoved me and punched me in my chest and I just think that, you know, history has to be vindi-
[fol. 189h] cated, the Negro has to have the right to vote and to participate in democratic elections and have their representative seated. The time for attitudes is over and that Georgia is moving more toward a totalitarian state rather than moving toward democracy. Now the question was asked, what will we do? We have a constitutional right to protest and it is hoped that the people in this district, those students over at the campuses will come down and support him and maybe we might even have to have a boycott on Georgia.

Q. Are you going to demonstrate at the Capitol?

A. No, we don't want a demonstration. We want this man to be seated. We want the Georgia House to seat him because he was duly elected by the people in that district, and he has a right to be seated—

Q. Will you stand by the statement of SNCC earlier and you do not back off from this?

A. That's right.

Q. Mr. Moore, what do you think will happen before this Committee?

A. I think that the Committee is going to try to take some type of compromise and come out with a censure of

Mr. Bond which we find reprehensible. We think that there should be morality in politics and that there should be morality in proceedings to determine his eligibility to sit in the House.

Q. You want him cleared?

A. Yes, we want him cleared. If there is anything for him to be cleared. But as it stands there is nothing for him to be cleared except for the fact that some people don't like his attitude. You can't clear somebody's else's mind about your attitude.

Q. Mr. Bond, what exactly is your attitude?

A. I just read a statement of my attitude that I explained to my constituents who I happen to think are the people who can demand an explanation of my attitude and I have circulated that explanation of my attitude to them—about 5,000 copies.

Q. Do you think it's proper for an elected official to [fol. 189i] advocate the violation of federal or state laws?

A. Well, I don't know. I'm not a lawyer. I know this elected official has not done so.

Q. Mr. Bond—

Interruption: The issues are the right of dissent. People —legislatures all over this Congress— Yesterday, Mr. Bond received eight telegrams from the Massachusetts Legislature supporting his right to have to dissent. The people in the Congress of the United States who will constantly be dissenting from the policies of the Administration, and that's the fundamental issue. Whether or not a man elected to a Georgia Legislature has a right to disagree with some members of that Legislature and if he doesn't have that right, then why should he be elected?

Let's go.

Thank you very much.

I take it again Mr. Moore that you object to the submission of that evidence on the same ground that you objected to the first one before this one and before the first notes. You renew that objection?

A. Yes, sir.

[fol. 189j] DEFENDANTS' EXHIBIT 1

Case No. 9895

Admitted Jan 28 1966

STATE OF GEORGIA
COUNTY OF FULTON

Personally appeared before me, an officer duly authorized to administer oaths, Leon G. Hay, Chief Registrar of Fulton County, who, after being sworn, deposes and says:

That he is Chief Registrar for Fulton County, Georgia, vested by law with the custody of the voting registration records of said County, and that since prior to June 1, 1965, and until January 24, 1966, the records in his possession showed that Dr. Martin Luther King, Jr., was a qualified voter in the 132nd House District in Fulton County, Georgia, and that on January 24, 1966, Dr. Martin Luther King, Jr., transferred his voting residence to the 136th House District of Fulton County, Georgia.

/s/ LEON G. HAY
LEON G. HAY, Chief Registrar,
Fulton County, Georgia

Sworn to and subscribed before
me this 28th day of January 1966.

/s/ NORMA HAYGOOD
Notary Public
My commission expires 3-18-69.

(Seal)

[fol. 189k] Clerk's Certificate to foregoing exhibits (omitted in printing).

[fol. 195]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 9895

[Title omitted]

DEFENDANTS' MOTION TO DISMISS—Filed January 24, 1966

Come now the Defendants, and before answering and pursuant to Rule 12 of the Federal Rules of Civil Procedure, and wthout waiving their Motion to Strike Parties heretofore filed, move the Court as follows:

1.

Defendants move that the Complaint be dismissed on the ground that the Court lacks jurisdiction over the subject matter in that the Complaint shows on its face that the action complained of was a determination by the House of Representatives of the State of Georgia that Plaintiff Julian Bond was not qualified to be seated as a member of said legislative body, and appearing further from the body of the complaint and the attachments thereto that the federal questions asserted are unsubstantial. The determination of its members' qualifications is a matter which State law vests within the sole and exclusive jurisdiction of the House of Representatives, and, because of the absence of any substantial question concerning deprivation of federally protected rights, such determination is not subject to judicial review.

2.

Defendants move that the Complaint be dismissed on the ground that it fails to state a justiciable claim against [fol. 196] the defendants upon which relief can be granted.

[File endorsement omitted]

3.

Defendants move to dismiss the First Cause of Action in the Complaint in its entirety for failure to state a claim upon which relief can be granted in that said cause fails to allege in what way Article III, Section VII, Paragraph I of the Georgia Constitution is vague or conflicts with the First or Fourteenth Amendments to the United States Constitution.

4.

Defendants move to dismiss the Second Cause of Action in the Complaint in its entirety for failure to state a claim upon which relief can be granted in that the Complaint shows on its face that Mr. Bond was not and could not be expelled from the Georgia House of Representatives pursuant to Article III, Section VII, Paragraph I of the Constitution of Georgia.

5.

Defendants move to dismiss the Third Cause of Action in the Complaint in its entirety for failure to state a claim upon which relief can be granted for the reasons set forth in Paragraph 3 of this motion.

6.

Defendants move to dismiss the Fourth Cause of Action in the Complaint in its entirety for failure to state a claim upon which relief can be granted in that said cause fails to allege in any manner facts showing that Rule 61 of the House of Representatives was unconstitutionally administered against Representative-elect Bond, but rather that the Complaint shows on its face that said Rule was properly administered against him.

[fol. 197]

7.

Defendants move to dismiss the Fifth Cause of Action in the Complaint in its entirety for failure to state a claim upon which relief can be granted in that said Cause does

not allege any deprivation of rights guaranteed to the Plaintiff Bond, and does not allege any facts showing that any rights of any other Plaintiff or class have been violated, and that said cause fails to show that any federally protected rights have been violated.

8.

Defendants move to dismiss the Sixth Cause of Action in the Complaint for failure to state a claim upon which relief can be granted as the Complaint shows on its face that Representative-elect Bond has no standing to challenge the oath of office in that he did not possess the qualifications of office, and that he has waived any objections to the oath of office by offering to take said oath.

9.

Defendants move to dismiss the Seventh Cause of Action in the Complaint in its entirety for failure to state a claim upon which relief can be granted in that this Court has no jurisdiction under the Guaranty Clause of the United States Constitution.

10.

Defendants move to dismiss the Eighth Cause of Action in the Complaint in its entirety for failure to state a claim upon which relief can be granted in that the Complaint shows on its face that House Resolution 19 is not and cannot constitute a Bill of Attainder or ex post facto law.

[fol. 198]

11.

Defendants move to dismiss the Ninth Cause of Action in the Complaint in its entirety for failure to state a claim upon which relief can be granted in that the Fifth Amendment of the United States Constitution applies only to the federal government, and that the Complaint shows upon its face that the provisions of the Fifth Amendment do not

and cannot apply in any way to the refusal to seat Representative-elect Bond.

12.

Defendants move to dismiss the Tenth Cause of Action in the Complaint in its entirety for failure to state a claim upon which relief can be granted in that the Sixth Amendment to the United States Constitution applies only to the federal government, and that the Complaint shows that Representative-elect Bond was not deprived of any rights contained in said Sixth Amendment.

13.

Defendants move to dismiss the Eleventh Cause of Action in the Complaint in its entirety for failure to state a claim upon which relief can be granted in that the Complaint shows that Representative-elect Bond was deprived of no rights under the Privileges and Immunities Clause of the Fourteenth Amendment or the Free Assembly portion of the First Amendment.

14.

Defendants move to dismiss the Twelfth Cause of Action in the Complaint in its entirety for failure to state a claim upon which relief can be granted in that the Complaint shows that Representative-elect Bond was afforded due process of law in the proceedings in the Georgia House of Representatives.

[fol. 199]

15.

Defendants move to dismiss the Thirteenth Cause of Action in the Complaint in its entirety for failure to state a claim upon which relief can be granted in that the Complaint does not show that the Plaintiff Keyes has ever been deprived of the right to vote, and that Paragraph 7 of the Complaint shows that she in fact did vote for Representative-elect Bond in both the 1965 Primary and General election.

Wherefore, Defendants pray that this Motion be inquired into and sustained, and that the Complaint be dismissed with costs of Court assessed against the Plaintiffs.

Arthur K. Bolton, The Attorney General, William L. Harper, Assistant Attorney General, Alfred H. Evans, Jr., Assistant Attorney General, Peyton S. Hawes, Jr., Assistant Attorney General, Paul L. Hanes, Assistant Attorney General.

Address: 132 State Judicial Bldg., Atlanta, Georgia 30334.

[fol. 200] Certificate of Service (omitted in printing).

[fol. 221]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

Civil Action No. 9895

[Title omitted]

ANSWER—Filed January 28, 1966

Come Now the Defendants in the above-styled case and without waiving their motions heretofore filed, answer the Plaintiffs' petition as follows:

1.

Defendants deny Paragraph 1 and each and every subparagraph thereof of the Plaintiffs' complaint.

2.

Defendants deny Paragraph 2 and each and every subparagraph thereof of the Plaintiffs' complaint.

[File endorsement omitted]

3.

Defendants admit the allegations contained in Paragraph 3 except that it is specifically denied that Dr. Martin Luther King, Jr. is registered to vote in House District 136.

4.

Defendants admit the allegations of Paragraph 4 except that it is specifically denied that this action was brought against the Defendants as representative of all other members of the House of Representatives of the State of Georgia [fol. 222] and that there are common questions of law and fact involved.

5.

Defendants admit the allegations contained in paragraph 5.

6.

Defendants admit that Plaintiff Bond was duly elected to the House of Representatives, but specifically deny that said election was held pursuant to an order of this Court.

7.

Defendants admit the allegations of Paragraph 7 except that it is specifically denied that Dr. Martin Luther King, Jr.'s voting residence was transferred to House District 136, and it is specifically denied that the Plaintiffs or any members of their class are unrepresented in the House of Representatives.

8.

Defendants admit the allegations of Paragraph 8 but move to physically delete and expunge the last sentence of said paragraph on the ground that said allegation is irrelevant, immaterial and highly inflammatory and made solely for the purpose of prejudicing the court.

9.

Defendants admit the allegations of Paragraph 9 except that it is denied that the Plaintiff Bond was tried by the House of Representatives as that term is commonly used, and it is denied that House Rule 198 has any bearing on the issues in this case, and Defendants neither admit nor deny how any member of the Special Committee voted in that said committee in that said vote was in executive session.

10.

Defendants admit the allegations contained in Paragraph 10.

[fol. 223]

11.

Defendants admit the allegations of Paragraph 11 but deny that the Plaintiff Bond "was tried solely for making statements prior to his being seated."

12.

Defendants deny the allegations contained in Paragraph 12 of the complaint but admit that a hearing was held in the House of Representatives pursuant to petitions filed and attached to the complaint as exhibits.

13.

Defendants deny as alleged the allegations in Paragraph 13.

14.

Defendants deny as alleged the allegations in Paragraph 14.

15.

As alleged, no answer is required to this paragraph.

16.

Defendants neither admit nor deny the allegations of Paragraph 16.

17.

Defendants deny the allegations contained in Paragraph 17.

18.

As alleged, no answer is required to this paragraph.

19.

Defendants deny the allegations contained in Paragraph 19.

20.

As alleged, no answer is required to this paragraph.

[fol. 224]

21.

Defendants deny the allegations contained in Paragraph 21.

22.

As alleged, no answer is required to this paragraph.

23.

Defendants deny the allegations contained in Paragraph 23.

24.

As alleged, no answer is required to this paragraph.

25.

Defendants deny the allegations contained in Paragraph 25.

26.

As alleged, no answer is required to this paragraph.

27.

Defendants deny the allegations contained in Paragraph 27.

28.

As alleged, no answer is required to this paragraph.

29.

Defendants deny the allegations contained in Paragraph 29.

30.

As alleged, no answer is required to this paragraph.

31.

Defendants deny the allegations contained in Paragraph 31.

32.

As alleged, no answer is required to this paragraph.

33.

Defendants deny the allegations contained in Paragraph 33.

[fol. 225] 34.

As alleged, no answer is required to this paragraph.

35.

Defendants deny the allegations contained in Paragraph 35.

36.

As alleged, no answer is required to this paragraph.

37.

Defendants deny the allegations contained in Paragraph 37.

38.

As alleged, no answer is required to this paragraph.

39.

Defendants deny the allegations contained in Paragraph 39.

40.

Defendants deny the allegations contained in Paragraph 40.

41.

Defendants deny the allegations contained in Paragraph 41.

Wherefore, having fully answered Defendants pray that they have verdict and judgment in this action and their cost of court.

Arthur K. Bolton, The Attorney General, William L. Harper, Assistant Attorney General, Alfred L. Evans, Jr., Assistant Attorney General, Peyton S. Hawes, Jr., Assistant Attorney General.

Paul L. Hanes, Assistant Attorney General, 132 State Judicial Building, Atlanta, Georgia 30334.

[fol. 226] *Duly sworn to by Geo. G. Smith, jurat omitted in printing.*

[fol. 227] Certificate of Service (omitted in printing).

[fol. 232]

IN UNITED STATES DISTRICT COURT

February 1, 1966

[Stamp—Filed in Clerk's Office—Feb 3 1966—Claude L. Goza, Clerk—By: hdr, Deputy Clerk]

No. C. A. 9895

Honorable Ben W. Fortson
Secretary of State of Georgia
State Capitol Building
Atlanta, Georgia

Dear Mr. Fortson:

I am instructed by Representative-elect Julian Bond, 823 Drummond Street, S.W., Atlanta, Georgia, to notify you that Mr. Bond has qualified as a candidate in the special election to be held on February 23, 1966 to fill the alleged vacancy in House District 136, Fulton County, Georgia, under protest. Mr. Bond reserves the right to recover the qualifying fee which he has posted in the amount of Five Hundred Dollars and such other expenses as are necessary and incidental to qualifying and winning election in the above mentioned special election. Mr. Bond, also, reserves the right to avail himself of such other remedies, legal and equitable, as are available or as shall become available to save him and his constituents harmless as the results of his and their participation in said election.

Your attention is called to the case of *Bond, et al.* v. *Floyd, et al.*, Civil Action No. 9895 now pending in The United States District Court for the Northern District of Georgia, Atlanta Division.

Copies of this letter are being mailed and lodged with The Ordinary of Fulton County, Georgia, The Attorney

General of The State of Georgia, and The Clerk of The United States District Court.

[fol. 233] Sincerely yours,

" /s/ Howard Moore, Jr.
Attorney for Representative-Elect from the 136th House District, Julian Bond.

[fol. 234]

In the United States District Court

For the Northern District of Georgia

Atlanta Division

Civil Action No. 9895

Julian Bond, Dr. Martin Luther King, Jr., and Mrs. Arel Keyes, for themselves jointly and severally, and for all other similarly situated, Plaintiffs,

v.

James "Sloppy" Floyd, William J. "Bill" Lee, Ed T. Fulford, J. Terrell Webb, W. Jones Lane, and David L. Newton, individually and as members of the House of Representatives of the State of Georgia and as Representatives of the class of citizens who are presently serving as members of the House of Representatives of the State of Georgia; George T. Smith, individually and as Speaker of the House of Representatives of the State of Georgia and as Chairman of the Rules Committee of the House of Representatives of the State of Georgia and as Chairman of the Challenge Committee appointed to consider the seating of Julian Bond; Glenn W. Ellard, individually and as Clerk of the House of Representatives of the State of Georgia; Maddox J.

HALE, individually and as Speaker Pro-Tem of the House of Representatives of the State of Georgia; ELMORE C. THRASH, individually and as Messenger of the House of Representatives of the State of Georgia; DAVID PEEPLES, individually and as Doorkeeper of the House of Representatives of the State of Georgia; and BEN W. FORTSON, individually and as Secretary of State of the State of Georgia; and JACK TYSON, individually and as Sheriff of the House of Representatives of the State of Georgia, Defendants.

Before TUTTLE and BELL, Circuit Judges, and MORGAN, District Judge.

[fol. 235] BELL, Circuit Judge and MORGAN, District Judge:

OPINION AND ORDER—February 10, 1966

Mr. Bond, one of the plaintiffs in this matter and a Negro, was refused his seat as a member of the House of Representatives of the General Assembly of Georgia. He was a Representative-elect, having been duly elected by the voters of House District No. 136 for the session of the General Assembly commencing January 10, 1966. This was a special election for a one year term made necessary by the reapportionment decision of this court. *Toombs* v. *Fortson*, N.D., Ga., 1965, 241 F.Supp. 65.

On the first day of the session, at which time Mr. Bond and other members of the House were to take the oath of office, Mr. Bond was asked to step aside because of challenges to his qualifications having been filed by seventy-five of the two-hundred-five members of the House. After the other members were sworn, including seven Negro representatives, petitions protesting the seating of Representative-Elect Bond were referred by the Speaker of the House to a special committee designated to hear the contest. This committee, after a hearing, recommended that he not be seated. This recommendation was accepted by

the House and he was denied his seat by a vote of one hundred eighty-four to twelve.

Dr. King and Mrs. Keyes, the other plaintiffs, seek along with Mr. Bond to represent the citizens and voters of House District No. 136 as a class, and it is affirmatively alleged that they are Negro citizens of House District No. 136 and that they are registered voters. They allege that there are common questions of law and fact affecting the civil rights of Negroes to vote and to have members of their race represent them in the House of Representatives of the State of Georgia. It is undisputed that Dr. King and Mrs. Keyes are residents of the district, but it is also undisputed [fol. 236] that Dr. King is not registered to vote in the district but in the House District No. 132.

The defendants are the Speaker of the House, the Speaker Pro-Tem, several members of the House representing the membership, certain officers of the House, and the Secretary of State of the State of Georgia. Jurisdiction for declaratory and injunctive relief is asserted under 28 USCA, §§ 1331, 1343(3), 1343(4), and 2201; and 42 USCA, §§ 1971(d), 1983, and 1988. Three-Judge District Court jurisdiction was premised on 28 USCA, § 2281 by a claim that the provision of the Georgia Constitution which permits the members of the House to judge the qualifications of its members, and House Rule 61 which embodies the same provision are unconstitutionally vague, or were unconstitutionally administered with respect to Mr. Bond.

The additional causes of action set forth in the complaint were refined by briefs into claims that Mr. Bond was barred from membership because he was a Negro; that the action of the House denied him his First Amendment right to free speech; that he was denied procedural due process as guaranteed by the due process clause of the Fourteenth Amendment; that he was denied substantive due process in that there was no rational basis for the action of the House; that the House resolution barring Mr. Bond constituted an *ex post facto* law and a bill of attainder; and

that the House action deprived the residents of the House District No. 136 of a republican form of government, equal protection of the law under the Fourteenth Amendment, and the right as Negroes under the Fifteenth Amendment to vote. The prayer is that defendants be enjoined from excluding Mr. Bond from membership in the House.

The defendants, by motion, have denied the jurisdiction of the court. Additionally, in the alternative, they have [fol. 237] moved to dismiss Dr. King and Mrs. Keyes as plaintiffs. They have also answered the complaint. It was stipulated that a final judgment might be rendered on the pleadings, the stipulated facts and such other evidence as was introduced on the hearing of this matter. We thus proceed to final disposition.

The facts which gave rise to the challenge to Mr. Bond stem from a statement issued on January 6, 1966 by the Student Non-violent Coordinating Committee, an organization active in the civil rights field. Mr. Bond is and was Communications Director of this organization. After the statement was issued, Mr. Bond, upon inquiry, advised the news media that he supported the statement in its entirety. He added that he admired the courage of persons who burned their draft cards; that he was a pacifist who was eager and anxious to encourage people not to participate in the war in Viet Nam for any reason that they might choose; and said that as a second class citizen he did not feel that he should be required to support the war in Viet Nam.

The SNNC statement follows in full:

> "The Student Nonviolent Coordinating Committee has a right and a responsibility to dissent with United States foreign policy on an issue when it sees fit. The Student Nonviolent Coordinating Committee now states its oppostion to United States' involvement in Viet Nam on these grounds:

"We believe the United States government has been deceptive in its claims of concern for freedom of the Vietnamese people, just as the government has been deceptive in claiming concern for the freedom of colored people in such other countries as the Dominican Republic, the Congo, South Africa, Rhodesia and in the United States itself.

"We, the Student Nonviolent Coordinating Committee, have been involved in the black people's struggle for liberation and self-determination in this country [fol. 238] for the past five years. Our work, particularly in the South, has taught us that the United States government has never guaranteed the freedom of oppressed citizens, and is not yet truly determined to end the rule of terror and oppression within its own borders.

"We ourselves have often been victims of violence and confinement executed by United States government officials. We recall the numerous persons who have been murdered in the South because of their efforts to secure their civil and human rights, and whose murderers have been allowed to escape penalty for their crimes.

"The murder of Samuel Young in Tuskegee, Ala., is no different than the murder of peasants in Viet Nam, for both Young and the Vietnamese sought, and are seeking, to secure the rights guaranteed them by law. In each case the United States government bears a great part of the responsibility for these deaths.

"Samuel Young was murdered because United States law is not being enforced. Vietnamese are murdered because the United States is pursuing an aggressive policy in violation of international law. The United States is no respecter of persons or law when such persons or laws run counter to its needs and desires.

"We recall the indifference, suspicion and outright hostility with which our reports of violence have been met in the past by government officials.

"We know that for the most part, elections in this country, in the North as well as the South, are not free. We have seen that the 1965 Voting Rights Act and the 1964 Civil Rights Act have not yet been implemented with full federal power and sincerity.

"We question, then, the ability and even the desire of the United States government to guarantee free elections abroad. We maintain that our country's cry of 'preserve freedom in the world' is a hypocritical mask behind which it squashes liberation movements which are not bound, and refuse to be bound, by the expediencies of United States cold war policies.

"We are in sympathy with, and support, the men in this country who are unwilling to respond to a military draft which would compel them to contribute their lives to United States aggression in Viet Nam in the [fol. 239] name of the 'freedom' we find so false in this country.

"We recoil with horror at the inconsistency of a supposedly 'free' society where responsibility to freedom is equated with the responsibility to lend oneself to military aggression. We take note of the fact that 16 percent of the draftees from this country are Negroes called on to stifle the liberation of Viet Nam, to preserve a 'democracy' which does not exist for them at home.

"We ask, where is the draft for the freedom fight in the United States?

"We therefore encourage those Americans who prefer to use their energy in building democratic forms within this country. We believe that work in the civil rights movement and with other human relations organizations is a valid alternative to the draft. We urge all Americans to seek this alternative, knowing full well that it may cost their lives—as painfully as in Viet Nam."

On the same day a newspaper reporter asked Mr. Bond for his views on the subject of the burning of draft cards. He stated that he would not burn his own but admired the courage of those who did.

During a taped interview with a representative of the media, Mr. Bond, after endorsing the SNCC statement was asked why he endorsed it, and his answer was as follows:

> "Why, I endorse it, first, because I like to think of myself as a pacifist and one who opposes that war and any other war and eager and anxious to encourage people not to participate in it for any reason that they choose; and secondly, I agree with this statement because of the reason set forth in it—because I think it is sorta hypocritical for us to maintain that we are fighting for liberty in other places and we are not guaranteeing liberty to citizens inside the continental United States."

When asked if he thought his views were at variance with the duties that might be required of him as a Representative in the House of Representatives of the State of Georgia, Mr. Bond replied:

> [fol. 240] "Well, I think that the fact that the United States Government fights a war in Viet Nam, I don't think that I as a second class citizen of the United States have a requirement to support that war. I think my responsibility is to oppose things that I think are wrong if they are in Viet Nam or New York, or Chicago, or Atlanta, or wherever."

These facts were introduced before the House committee hearing the challenge. Mr. Bond was represented by counsel at the hearing and testified. He reaffirmed his adherence to all of these statements at the hearing and stated that they were still his views. There was no evidence then nor at the hearing before this court that Mr. Bond had

receded in any way from his views. However, by way of explanation, he did state to the House committee that he had never suggested or advocated that anyone burn his draft card. He stated his willingness and desire to take the prescribed oath to support the Constitution of the United States and the State of Georgia.

The petitions challenging Mr. Bond which were before the special committee of the House contain several grounds, including the contention that Mr. Bond's actions and statements gave aid and comfort to the enemies of the United States, and also violated the Selective Service laws, 50 App., USCA, § 462(a) and (b), and tended to bring discredit and disrespect on the House of Representatives.

The challenge was also on the basis that the statements and views of Mr. Bond disqualified him to take the oath to support the Constitution of the United States and the Constitution of Georgia as is required of a member of the House of Representatives. The theory was that Mr. Bond's statements were so repugnant to and inconsistent with his oath as to make it apparent that he could not honestly take the oath. This theory presents the central issue in the case.

[fol. 241] Pending Motions

Defendants moved to dismiss the complaint on the ground that the court lacks jurisdiction over the subject matter. Their view is that the determination of the qualifications of a member of the State House of Representatives is a matter which state law vests in the sole and exclusive jurisdiction of the House of Representatives and that the federal questions asserted are insubstantial. They urge that the absence of any substantial question concerning deprivation of federally protected rights indicates that the action of the House is not subject to federal judicial review.

The extent of review under the circumstances will be discussed hereinafter under the merits of the controversy. However, we do hold that the court has jurisdiction over the subject matter of the complaint. It could hardly be

argued that the House could refuse to seat a member because of his race or for any other reason amounting to an invidious discrimination under the equal protection clause of the Fourteenth Amendment. Cf. *Baker* v. *Carr*, 1962, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663. The denial of a seat to a Negro representative-elect would also violate the Fifteenth Amendment. Cf. *Gomillion* v. *Lightfoot*, 1960, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110. We think it follows that the court has jurisdiction over a denial of First Amendment rights by the state, and that the federal rights asserted here are not so insubstantial as to warrant our refusing jurisdiction. The motion of the state to dismiss will be overruled and an order may be presented accordingly.

The defendants also have motions pending to strike the plaintiffs King and Keyes on the ground that they do not [fol. 242] have such a direct interest in the litigation as would give them standing. They base their standing on an absence of representation in the House because Mr. Bond was deprived of his seat. The Governor has called an election for February 23, 1966 to fill the vacant seat.[1]

It is settled that one seeking to challenge the constitutionality of the statute must show that he has sustained or is in danger of sustaining some immediate direct injury. *Liverpool, N.Y. and P. Steamship Company* v. *Comm. of Emigration*, 1885, 113 U.S. 33, 5 S.Ct. 352, 28 L.Ed. 899; *Commonwealth of Massachusetts* v. *Mellon*, 1923, 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078. Dr. King and Mrs. Keyes have not " . . . alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues . . . " necessary in determining constitutional questions. *Baker* v. *Carr*, supra.

---

[1] Mr. Bond is a candidate for the vacant seat and is the only candidate. The qualifications closed on February 7, 1966. The General Assembly will adjourn its present session on Friday, February 18, 1966. There will be no other regular session of the General Assembly during the year 1966.

In a case involving the temporary lack of representation because an United States Senator had been denied his seat pending inquiry into his election and qualifications, *Barry v. United States*, 1929, 279 U.S. 597, 49 S.Ct. 452, 73 L.Ed. 867, the court said:

> "The temporary deprivation of equal representation which results from the refusal of the Senate to seat a member pending inquiry as to his election or qualifications is the necessary consequence of the exercise of a constitutional power, and no more deprives the State of its 'equal suffrage' in the constitutional sense than would a vote of the Senate vacating the seat of a sitting member or a vote of expulsion."

[fol. 243] We are of the opinion that plaintiffs King and Keyes do not have such a direct interest in the litigation as would give them standing to bring the complaint. This is particularly so in view of the fact that the complaint of Mr. Bond alone will resolve every conceivable issue. Moreover, Dr. King is not a registered voter in the House District in question. The motion of the state to dismiss as to these two plaintiffs will be granted and an order may be presented accordingly.

The Merits

The contention that Mr. Bond was denied his seat because of his race was resolved adversely to him from the bench during the hearing of this matter. To support this contention it was urged that Mr. Bond was a Negro; that SNCC was a militant civil rights organization; and that the question of race was inextricably related to each and every statement forming the basis of the challenge. This logic would create license in the name of race. Furthermore, seven Negroes, as stated, were seated on the same day as representatives. Two served on the special challenge committee at the request of Mr. Bond; two Negro senators appeared before the committee as character wit-

nesses for him; and two of the Negro representatives spoke on the floor of the House for him before the final vote. The charge of racial discrimination and thus of denial of equal protection of the law is without foundation in fact.

This ruling also disposes of any claim that Mr. Bond or the citizens and voters of House District No. 136 have been deprived of any right as Negroes under the equal protection clause of the Fourteenth Amendment or under the [fol. 244] Fifteenth Amendment. For the reasons stated on the standing question we reject also the contention that the action of the House denied them a republican form of government. This is not even a justiciable issue. *Baker* v. *Carr,* supra.

The substantial issue in the case rests on the guaranty of freedom of speech or to dissent under the First Amendment as that amendment has long been applicable to the states under the due process clause of the Fourteenth Amendment. *Gitlow* v. *New York,* 1925, 268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138; *De Jonge* v. *Oregon,* 1937, 299 U.S. 353, 57 S.Ct. 255, 81 L.Ed. 278. But the inquiry does not end simply on the question of deprivation of First Amendment rights *per se.* Rather the inquiry must be in the context of two fundamental principles of government: separation of powers and state government under our system of federalism. The right of free speech would not long exist absent a government founded on these principles.

James Madison writing in Federalist No. 47 said with respect to the separation of powers doctrine:

> "The accumulation of all powers, legislative, executive, and judiciary in the same hands, whether of one, a few or many, and whether heredity, self-appointed, or elective, may justly be pronounced the very definition of tyranny."

And from the beginning states have claimed and enjoyed the protection of the separation of powers principle as between their respective branches of government. This, to date, has been a part of our federalism.

Georgia adopted the separation of powers principle in its first Constitution. Art. I, Const. of 1777. McElreath, Constitution of Ga., § 239, p. 229. The Constitution of 1789, Art. I, § XIII, McElreath, supra, § 314, p. 243, provided that each House of the state legislature would be the judge of the elections, returns and qualifications of its own members and have the power to expel or punish for disorderly [fol. 245] behavior. Similar provisions have been included in every other Georgia Constitution. Ga. Const. of 1798, Art. I, § VIII, McElreath, § 364, p. 253; Const. of 1861, Art. II, § IV, Par. I, McElreath, § 484, p. 286, Const. of 1865, Art. II, § IV, Par. I, McElreath, § 585, p. 304; Const. of 1868, Art. III, § IV, Par. I, McElreath, § 709, p. 328; Const. of 1877, Art. III, § VII, Par. I, McElreath, § 882, p. 361.

> "Each House shall be the judge of the election, returns, and qualifications of its members and shall have power to punish them for disorderly behavior, or misconduct by censure, fine, imprisonment, or expulsion; but no member shall be expelled, except by a vote of two-thirds of the House to which he belongs."

This language is to be compared with Art. I, § 5, Clauses 1 and 2 of the Constitution of the United States:

> "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, . . ." (Clause 1)
>
> "Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member." (Clause 2)

The Georgia courts have consistently refused to take jurisdiction over controversies having to do with the qualifications of legislators. The Senate or House, as happened to be the case, was deemed to have exclusive jurisdiction under the Georgia Constitution. *Rainey* v. *Taylor*, 1928,

[fol. 246] 166 Ga. 476, 143 S.E. 383; *Fowler* v. *Bostick*, 1959, 99 Ga. App. 428, 108 S.E.2d 720; and *Beatty* v. *Myrick*, 1963, 218 Ga. 629, 129 S.E.2d 764. This is the general law in this country. Indeed we believe that there is no case to the contrary, federal or state.

Plaintiff recognizes the separation of powers principle as such on both the federal and state levels. He argues however that it exists on the state level only insofar as it does not conflict with the Federal Constitution and must therefore give way to First Amendment rights in view of the vertical application of those rights to the states through the due process clause of the Fourteenth Amendment. This is a correct statement of the law subject to whatever rights were left by the Fourteenth Amendment to the state legislative branches for control of their internal affairs under our system of federalism. We thus must measure Mr. Bond's freedom to speak in this frame of reference.

Before attempting to resolve this new and substantial constitutional question we must concern ourselves with the threshold question, not asserted by plaintiffs, of whether the legislature had the power under the state Constitution or laws to bar Mr. Bond. Our distinguished and able Chief Judge is of the firm view that no such power existed. He seems to find the power of expulsion, but limits the power of judging qualifications to those expressed in the Georgia Constitution. We believe this to be a restrictive view, unfounded in recognized authority and not in keeping with our history or the principle of separation of powers.

Judge Story gave the reasons for vesting exclusive jurisdiction in the legislative branch in such cases (Story, Comm. on the Const., Vol. II, § 831, p. 294):

> [fol. 247] "It is obvious, that a power must be lodged somewhere to judge of the elections, returns, and qualifications of the members of each house composing the legislature; for otherwise there could be no certainty, as to who were legitimately chosen members, and any intruder, or usurper, might claim a seat, and thus trample upon the rights, and privileges, and liberties

> of the people. Indeed, elections would become, under such circumstances, a mere mockery; and legislation the exercise of sovereignty by any self-constituted body. The only possible question on such a subject is, as to the body, in which such a power shall be lodged. If lodged in any other, than the legislative body itself, its independence, its purity, and even its existence and action may be destroyed, or put into imminent danger. No other body, but itself, can have the same motives to preserve and perpetuate these attributes; no other body can be so perpetually watchful to guard its own rights and privileges from infringement, to purify and vindicate its own character, and to preserve the rights, and sustain the free choice of its constituents. Accordingly, the power has always been lodged in the legislative body by the uniform practice of England and America."

The Supreme Court in *Re Chapman,* 1897, 166 U.S. 661, 17 S.Ct. 677, 41 L.Ed. 1154, a case involving a senate investigation of the conduct of some of its members, said:

> "Under the Constitution the Senate of the United States has the power to try impeachments; to judge of the elections, returns, and qualifications of its own members; to determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two thirds, expel a member; and it necessarily possesses the inherent power of self-protection."

We believe a state legislative body necessarily possesses this same inherent power of self-protection if the separation of powers doctrine is to have any real meaning on the state level. And self-protection goes to the process of qualifications as well as expulsion.

In *Hiss* v. *Bartett,* 1855, 3 Gray 468, 63 Am. Dec. 768, the question concerned the legislative power to expel a member. [fol. 248] The Massachusetts Constitution contained no such

power but did contain the power to judge returns, elections and qualifications. The court said:

> "The authority to be 'judge of the returns, elections, and qualifications of its own members,' does not limit their power; they are judges in other respects, in all respects."

Art. I, § 5, of the United States Constitution, as noted, provides that each House shall be the judge of the elections, returns and qualifications of its own members. Art. I, § 3 provides that no person shall be a representative unless he meets certain age, citizenship and residential requirements. In the Constitutional Convention there was an attempt to set up affirmative qualifications. During the debate on that draft which was later rejected, Mr. Dickinson of Delaware, opposed the formulation because it would be held to be exclusive. He stated that he was "against any recitals of qualifications in the Constitution. It was impossible to make a complete one, and a partial one would, by implication, tie up the hands of the Legislature from supplying omissions." Mr. Wilson of Pennsylvania took the same view, saying: "Besides a partial enumeration of cases will disable the Legislature from disqualifying odious and dangerous characters." (Proceedings in Congressional Record, 80th Congress, First Session, January 3, 1947, Vol. 93, p. 12, Senate debate on whether Senator Bilbo of Mississippi was disqualified.)

By way of a historical precedent, Mr. Bilbo was denied his seat in the United States Senate because, among other reasons, his views regarding the right of Negroes to vote were repugnant to the oath he would be required to take. The Senate did not believe that it was limited to the qualifications expressed in the Constitution.

[fol. 249] See Willoughby, The Constitutional Law of the United States, 2nd ed., Vol. I, p. 610, where after discussing in § 340 the subject of qualifications for membership being determined by Congress, the author states:

"The instances which have been cited make it sufficiently clear that the Senate and House have repeatedly held it to be proper that they should consider whether or not persons should be admitted as Senators or Representatives even though possessing all of the qualifications prescribed by the Constitution for membership and bringing credentials in due form of their election."

In the case of Senator Reed Smoot of Utah who had been seated but whose qualifications to continue as a Senator were questioned, the investigation committee recommended that he be expelled either for reason of his membership in a church that countenanced and encouraged polygamy and united church and state contrary to the spirit of the Constitution, or because he had taken an oath of such a nature and character that he is disqualified from taking the oath of office required of an United States Senator. The question was raised concerning the ability of the Senate to add qualifications other than those enumerated in the Constitution and was answered in the report as follows:

"If his conduct has been such as to be prejudicial to the welfare of society, of the nation, or its Government, he is regarded as being unfit to perform the important and confidential duties of a Senator, and may be deprived of a seat in the Senate, although he may have done no act of which a court could take cognizance." 1 Hind's Precedents, §§ 481-483.

This situation is analogous to the Georgia Constitution. There is nothing in it which limits qualifications of a legislator to those expressed therein. In point of fact there is at least one disqualification in the Georgia law which is not contained in the Constitution. Ga. Code, §§ 89-101, § 5, provides:

[fol. 250] "The following persons are held and deemed ineligible to hold any civil office, and the existence of any of the following states of facts shall be a sufficient rea-

son for vacating any office held by such person, but the acts of such person, while holding a commission, shall be valid as the acts of an officer de facto, viz:

* * * * * * *

"Persons of unsound mind, and those who, from advanced age or bodily infirmity, are unfit to discharge the duties of the office to which they are chosen or appointed."

The qualifications and disqualifications of legislators in the Georgia Constitution are not all inclusive. In sum, we find nothing that would compel the House to seat a member if a reasonable basis, within the context of due process of law as we shall next discuss, exists for the denial.

Having assumed jurisdiction, we come then to the main question of whether Mr. Bond was improperly denied his seat, but this question is prefaced by the test to be applied. With respect to the test, we hold that the free speech issue should be resolved in the context of giving effect to the separation of powers principle, and also our system of federalism to the extent that it permits self-government to the states under the supremacy of the Federal Constitution.

There is some authority for such an approach. On the federal level we have some guidance in the case of *Barry* v. *United States*, 1929, 279 U.S. 597, 49 S.Ct. 452, 73 L.Ed. 867. That case arose out of the refusal to seat Senator Vare because of alleged corruption in his election. The issue was over whether the District Court could grant relief to a witness who had been arrested by the Senate because he refused to testify at the subsequent inquiry. The Supreme [fol. 251] Court pointed out that the Senate was acting within its constitutional powers which were judicial in character and refused relief. It was said:

"Here the question under consideration concerns the exercise by the Senate of an indubitable power; and if judicial interference can be successfully invoked it can only be upon a clear showing of such arbitrary

and improvident use of the power as will constitute a denial of due process of law. That condition we are unable to find in the present case."

On the state level, with respect to state elections and thus giving effect to federalism but in no way involving the separation of powers principle, we begin with *Wilson* v. *North Carolina,* 1898, 169 U.S. 586, 18 S.Ct. 435, 42 L.Ed. 865. There the governor suspended a railroad commissioner and refused him a hearing. The Supreme Court refused relief. In *Snowden* v. *Hughes,* 1944, 321 U.S. 1, 64 S.Ct. 397, 88 L.Ed. 497, a candidate for the state senate alleged that the State Primary Canvassing Board denied him his rights under the equal protection clause by a willful, malicious and arbitrary refusal through a conspiracy to correctly certify the results of a primary election thereby eliminating him as a candidate. He brought his suit in the District Court under the Civil Rights Act of 1871. The Supreme Court refused relief on the ground that his case did not rise to the level of invidious, purposeful discrimination cognizable under the equal protection clause of the Fourteenth Amendment. The applicable rule of the case is to be found in the dissenting opinion of Mr. Justice Douglas, as follows:

"My disagreement with the majority of the Court is on a narrow ground. I agree that the equal protection clause of the Fourteenth Amendment should not be [fol. 252] distorted to make the federal courts the supervisor of the state elections. That would place the federal judiciary in a position 'to supervise and review the political administration of a state government by its own officials and through its own courts' (Wilson v. North Carolina, 169 US 586, 596, 42 L ed 865, 871, 18 S Ct 435)—matters on which each State has the final say. I also agree that a candidate for public office is not denied the equal protection of the law in the constitutional sense merely because he is the victim

of unlawful administration of a state election law. I believe, as the opinion of the Court indicates, that a denial of equal protection of the laws requires an invidious, purposeful discrimination. But I depart from the majority when it denies Snowden the opportunity of showing that he was in fact the victim of such discriminatory action. His complaint seems to me to be adequate to raise the issue. He charges a conspiracy to wilfully, maliciously and arbitrarily refuse to designate him as one of the nominees of the Republican party, that such action was an 'unequal' administration of the Illinois law and a denial to him of the equal protection of the laws, and that the conspiracy had that purpose...."

Snowden v. *Hughes*, as well as *Baker* v. *Carr*, supra, at least teach that there must be a showing of invidious, purposeful discrimination to give rise to relief under the equal protection clause. Here we have the due process clause and First Amendment rights. We think these cases show that some restraint is to be practiced by the courts in considering state political questions concerning particular offices as distinguished from whole systems such as are prevalent in malapportionment, or racial discrimination. If this premise be correct, then there is room for a balance between the separation of powers principle, a system of federalism and individual rights afforded under the federal Constitution.

Being of this view, we conclude that a reasonable test under circumstances such as are presented in this case would be to assume jurisdiction for the purpose of determining whether Mr. Bond was denied due process of law, [fol. 253] either procedural or substantive. Notice, an opportunity to be heard, to be represented by counsel, to testify and to offer evidence and to cross-examine adverse witnesses are envisioned in procedural due process. The transcript of the hearing which was held on the challenge to Mr. Bond demonstrates no absence of due process. It

is true that there was no subpoena power but no request for an absent witness was made. We reject the contention that procedural or substantive due process was violated by allowing the challengers to vote. A holding to the contrary would do violence to the power to judge qualifications.

As to substantive due process, we conclude that there must be a rational evidentiary basis for the ruling of the House to deny Mr. Bond his seat. The act must not have been arbitrary.

Does the action rest on any evidence which would support the denial? *Thompson* v. *Louisville*, 1960, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654; *Garner* v. *Louisiana*, 1961, 368 U.S. 157, 82 S.Ct. 248, 7 L.Ed.2d 207.

Mr. Bond's right to speak and to dissent as a private citizen is subject to the limitation that he sought to assume membership in the House. As such he was required to take an oath to support the Constitution of the United States. This is a legitimate requirement. Indeed, the Federal Constitution requires it. Art. VI, § 3. One of the charges against him was that his statements were inconsistent with and repugnant to that oath. Was there any basis for this charge?

The SNCC statement is at war with the national policy of this country: To make certain that every citizen stands equal before the law; to make certain that every citizen has a fair chance to benefit in the freedom and opportu- [fol. 254] nities and bounties of this country; to export these same principles of democracy to the balance of the world wherever and whenever possible, even to the extent of lending military assistance where self-determination is denied in order that those denied may choose freedom if they so desire. A citizen would not violate his oath by objecting to or criticizing this policy or even by calling it deceptive and false as the statement did.

But the statement does not stop with this. It is a call to action based on race; a call alien to the concept of the pluralistic society which makes this nation. It aligns the organization with " . . . colored people in such other countries

as the Dominican Republic, the Congo, South Africa, Rhodesia . . . " It refers to its involvement in the black people's struggle for liberation and self-determination . . . ". It states that "Vietnamese are murdered because the United States is pursuing an aggressive policy in violation of international law." It alleges that Negroes, referring to American servicemen, are called on to stifle the liberation of Viet Nam.

The call to action, and this is what we find to be a rational basis for the decision which denied Mr. Bond his seat, is that language which states that SNCC supports those men in this country who are unwilling to respond to a military draft. The fact that the last paragraph calls on them to devote their energies to the alternative of working in the civil rights movement in no way avoids the fact that the organization offers support to men who are unwilling to respond to a military draft. Cf. *Gara* v. *United States*, 6 Cir., 1949, 178 F.2d 38.

[fol. 255] Mr. Bond was careful to affirm this statement. He went further, and he was more than a private citizen; he was an officer and employee of SNCC and was about to become a member of the House of Representatives of Georgia. He stated that he admired the courage of anyone who burned his draft card. He stated that as a pacifist he was eager and anxious to encourage people not to participate in the war in Viet Nam or in any other war for any reason that they choose, and lastly, he stated that, as a second class citizen, he did not think that he had the requirement to support the war in Viet Nam.

The Congress has the obligation under the Federal Constitution for providing for the common defense of this nation. The Selective Service System is a part of that defense. We are committed in Viet Nam. The Congress approved this course in Public Law 88-408, August 10, 1964, wherein the president was empowered to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression from the campaign being waged by the ". . . Communist

regime in North Vietnam." This resolution states that the United States " . . . regards as vital to its national interest and to world peace the maintenance of international peace and security in Southeast Asia."

Whether Mr. Bond should have been seated was a question which presented itself to the House of Representatives of Georgia under our system. Whether the wisest course was followed is not for us to say. The judgment of the court is not to be substituted for that of the House. Our function is to determine whether he has been denied some fundamental federal right to which he was otherwise entitled. We find and hold that his statements and affirmation of the SNCC statement as they bore on the functioning [fol. 256] of the Selective Service System could reasonably be said to be inconsistent with and repugnant to the oath which he was required to take. This suffices as a rational basis for the action of the House. The fact that the statement was otherwise freighted with racial overtones and was at variance with the established national concept of a country accommodating all nationalities and ethnic groups is a part of the basis of our holding only insofar as it relates to the call not to support the Selective Service System.

The charge that the constitutional provision of Georgia authorizing the House to judge the qualifications of its members and the House rule embodying it are unconstitutionally vague is without merit. It follows from what we have said that neither was unconstitutionally applied to Mr. Bond. It also follows from what we have said that the resolution denying Mr. Bond his seat was not an *ex post facto* law or a bill of attainder. To so hold in the face of a finding that there was a rational basis for the action of the House would be to destroy the constitutional power of judging qualifications.

All relief is denied and the complaint will be dismissed. Defendants may present a judgment accordingly.

This 10 day of February, 1966.

Griffin B. Bell, United States Circuit Judge.

Lewis R. Morgan, United States District Judge.

[fol. 257]

JUDGE ELBERT P. TUTTLE dissenting.

Tuttle, Circuit Judge:

With deference I must dissent. I am convinced that Representative-elect Bond was illegally deprived of his seat in the House of Representatives of Georgia and that this court should so hold.

Julian Bond, the plaintiff in this action, was duly elected by the voters of his General Assembly District No. 136 as their representative in the House of Representatives of the Georgia General Assembly for the session commencing January 1, 1966. This is a one-year session, made necessary by this Court's previous decision requiring a reapportionment of the Georgia State Legislature.

Upon his presenting himself along with the other newly elected members of the House of Representatives, he was asked to step aside because challenges to his qualifications had been filed by some 75 members of the House. After the other members had been duly sworn in, a resolution protesting the seating of Representative-elect Bond was referred by the Speaker of the House to a special committee designated to hear the contest. The committee, after a hearing, recommended that he be not seated. This recommendation was accepted by the House, and he was denied his seat.

Since the first attack that is made is based upon the contention that the House exceeded its authority in voting to reject Bond, we turn first to a consideration of the provisions of the Georgia Constitution dealing with the qualifications and eligibility of members.

Article III, Section VII, Paragraph I, of the Georgia Constitution (§2-1901, Ga. Code Ann.) provides as follows:

[fol. 258] "Election, returns, etc.; disorderly conduct.—East House shall be the judge of the election, returns, and qualifications of its members and shall have power to punish them for disorderly behavior, or misconduct, by censure, fine, imprisonment, or ex-

pulsion, but no member shall be expelled, except by a vote of two-thirds of the House to which he belongs."

Article III, Section VI, Paragraph I, of the Constitution of the State of Georgia (§2-1801, Ga. Code Ann.) provides as follows:

"Qualifications of representatives.—The Representatives shall be citizens of the United States who have attained the age of twenty-one years, and who shall have been citizens of this State for two years, and for one year residents of the counties from which elected."

Article II, Section II, Paragraph I, of the Constitution of the State of Georgia (§2-801, Ga. Code Ann.) provides as follows:

"Registration of electors; who disfranchised.—The General Assembly may provide, from time to time, for the registration of all electors, but the following classes of persons shall not be permitted to register, vote, or hold any office, or appointment of honor, or trust in this State, to-wit: 1st. Those who shall have been convicted in any court of competent jurisdiction of treason against the State, of embezzlement of public funds, malfeasance in office, bribery or larceny, or of any crime involving moral turpitude, punishable by the laws of this State with imprisonment in the penitentiary, unless such persons shall have been pardoned. 2nd. Idiots and insane persons."

Article III, Section IV, Paragraph VI, of the Georgia Constitution (§2-1606, Ga. Code Ann.) provides as follows:

"Eligibility; appointments forbidden.—No person holding a military commission, or other appointment, or office, having any emolument, or compensation annexed thereto, under this State, or the United States, or either of them except Justices of the Peace and officers of the militia, nor any defaulter for public

money, or for any legal taxes required of him shall have a seat in either house; nor shall any Senator, or Representative, after his qualification as such, be elected by the General Assembly, or appointed by the Governor, either with or without the advice and consent of the Senate, to any office or appointment having any emolument annexed thereto, during the time for which he shall have been elected, unless he shall first resign his seat, provided, however, that during the term for which he was elected no Senator or Representative shall be appointed to any civil office which has been created during such term."

[fol. 259] Article VII, Section III, Paragraph VI, of the Constitution of the State of Georgia (§2-5606, Ga. Code Ann.) provides as follows:

"Profit on public money.—The receiving, directly or indirectly, by any officer of State or county, or member or officer of the General Assembly of any interest, profits or perquisites, arising from the use or loan of public funds in his hands or moneys to be raised through his agency for State or county purposes, shall be deemed a felony, and punishable as may be prescribed by law, a part of which punishment shall be a disqualification from holding office."

Article III, Section IV, Paragraph V, of the Georgia Constitution (§2-1605, Ga. Code Ann.) provides as follows:

"Oath of members.—Each senator and Representative, before taking his seat, shall take the following oath, or affirmation, to-wit: 'I will support the Constitution of this State and of the United States, and on all questions and measures which may come before me, I will so conduct myself, as will, in my judgment, be most conducive to the interests and prosperity of this State."

The foregoing provisions of the Georgia Constitution are the only stated qualifications or rules of eligibility contained in the State Constitution touching on the membership in either the Senate or the House of Representatives of the Georgia General Assembly.

Julian Bond was denied the right to take his oath as an elected member of the Georgia House of Representatives by a resolution adopted by the said House on January 10, 1966, which said resolution was in the following language:

"Relative to the matter of the seating of Representative-Elect Julian Bond; and for other purposes.

"WHEREAS, a special committee created pursuant to H.R.No. 7 which was appointed for the purpose of holding a hearing on petitions challenging and contesting the seating of Representative-Elect Julian Bond of the 136th District has conducted a hearing in said matter; and

"WHEREAS, said committee has submitted a report in which it is recommended that Representative-Elect Julian Bond not be allowed to take the oath of office [fol. 260] as a Representative of the House of Representatives and that he not be seated as a member of the House of Representatives.

"NOW, THEREFORE, BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES that the report of the aforesaid committee is hereby adopted and the recommendations contained therein shall be followed.

"BE IT FURTHER RESOLVED that Representative-Elect Julian Bond shall not be allowed to take the oath of office as a member of the House of Representatives and that Representative-Elect Julian Bond shall not be seated as a member of the House of Representatives.

"BE IT FURTHER RESOLVED that the Clerk of the House is hereby instructed to immediately transmit a

copy of the aforesaid report and a copy of this resolution to the Governor, to the Secretary of State and to Representative-Elect Julian Bond."

The said resolution expressly "adopted" the report of the special committee which was appointed for the purpose of conducting, and did actually conduct, a hearing on the matter of the challenge to the seating of Representative-Elect Bond. The report of the committee follows:

"The Special Committee appointed pursuant to H.R. #7 conducted a hearing on January 10, 1966, beginning at 2:30 o'clock p.m., in the chamber of the House of Representatives, State Capitol, on the matter of petitions filed challenging and contesting the seating of Representative-Elect Julian Bond of the 136th District.

"Based upon testimony and the evidence and documents before this Committee, the Committee recommends that Representative-Elect Julian Bond not be allowed to take the oath of office as a member of the House of Representatives and that he not be seated as a member of the House of Representatives.

"This 10th day of January 1966."

The contest which was thus submitted to the special committee, and thereafter decided by the House, resulted from charges and specifications filed by certain members of the House of Representatives in two separate petitions which, in essential part, are as follows:

PETITION I

"COUNT I

"The Student Nonviolent Coordinating Committee, [fol. 261] an organization and association of which Representative-Elect Julian Bond is a member, agent, and publicity director, has caused to be made certain statements concerning the position of the United

States in the Viet Nam conflict, a copy thereof being attached hereto, marked Exhibit A and by reference made a part hereof, and the said Representative-Elect Julian Bond did publicly endorse, approve and confirm said statement.

"COUNT II

"Said representative-elect has said that he admires the courage of those persons who burn their draft cards.

1.

"The actions and statements of said representative-elect show that he does not and will not support the Constitution of the United States and of the State of Georgia, as required by law (Constitution of Georgia, Article III, Section IV, Paragraph V (Code §2-1605)); Constitution of the United States, Article VI, Section 3.

2.

"By said actions and statements, said representative-elect adheres to the enemies of the United States and of the State of Georgia, contrary to the Constitution of Georgia (Article I, Section II, Paragraph II) and of the United States (Article III, Section 3, Cl. 1).

3.

"By said actions and statements, said representative-elect gives aid and comfort to the enemies of the United States and of the State of Georgia, contrary to the Constitution of Georgia (Article I, Section II, Paragraph II) and of the United States (Article III, Section 3, Cl. 1).

4.

"Said actions and statements constitute a violation of the United States Code, Title 50, §462(a).

5.

"Said actions and statements constitute a violation of the United States Code, Title 50, §462(b), as amended.

6.

"The statements referred to above are reprehensible and are such as tend to bring discredit to and disrespect of the House of Representatives and constitute actions on the part of Representative-Elect Julian Bond sufficient to prevent him from being seated as a member of the House of Representatives.

7.

"Such actions and statements show that he is unqualified and ineligible to be a member of the House of Representatives."

EXHIBIT A TO PETITION I

"The Student Nonviolent Coordinating Committee has a right and a responsibility to dissent with United States foreign policy on an issue when it sees fit. The Student Nonviolent Coordinating Committee now states its opposition to United States' involvement in Viet Nam on these grounds:

"We believe the United States government has been deceptive in its claims of concern for freedom of the Vietnamese people, just as the government has been [fol. 262] deceptive in claiming concern for the freedom of colored people in such other countries as the Dominican Republic, the Congo, South Africa, Rhodesia and in the United States itself.

"We, the Student Nonviolent Coordinating Committee, have been involved in the black people's struggle for liberation and self-determination in this country for the past five years. Our work, particularly in the

South, has taught us that the United States government has never guaranteed the freedom of oppressed citizens, and is not yet truly determined to end the rule of terror and oppression within its own borders.

"We ourselves have often been victims of violence and confinement executed by United States government officials. We recall the numerous persons who have been murdered in the South because of their efforts to secure their civil and human rights, and whose murderers have been allowed to escape penalty for their crimes.

"The murder of Samuel Young in Tuskegee, Ala., is no different than the murder of peasants in Viet Nam, for both Young and the Vietnamese sought, and are seeking, to secure the rights guaranteed them by law. In each case the United States government bears a great part of the responsibility for these deaths.

"Samuel Young was murdered because United States law is not being enforced. Vietnamese are murdered because the United States is pursuing an aggressive policy in violation of international law. The United States is no respecter of persons or law when such persons or laws run counter to its needs and desires.

"We recall the indifference, suspicion and outright hostility with which our reports of violence have been met in the past by government officials.

"We know that for the most part, elections in this country, in the North as well as the South, are not free. We have seen that the 1965 Voting Rights Act and the 1964 Civil Rights Act have not yet been implemented with full federal power and sincerity.

"We question, then, the ability and even the desire of the United States government to guarantee free elections abroad. We maintain that our country's cry of 'preserve freedom in the world' is a hypocritical mask behind which it squashes liberation movements which are not bound, and refuse to be bound, by the expediencies of United States cold war policies.

"We are in sympathy with, and support, the men in this country who are unwilling to respond to a military draft which would compel them to contribute their lives to United States aggression in Viet Nam in the name of the 'freedom' we find so false in this country.

"We recoil with horror at the inconsistency of a supposedly 'free' society where responsibility to free-[fol. 263] dom is equated with the responsibility to lend oneself to military aggression. We take note of the fact that 16 percent of the draftees from this country are Negroes called on to stifle the liberation of Viet Nam, to preserve a "democracy" which does not exist for them at home.

"We ask, where is the draft for the freedom fight in the United States?

"We therefore encourage those Americans who prefer to use their energy in building democratic forms within this country. We believe that work in the civil rights movement and with other human relations organizations is a valid alternative to the draft. We urge all Americans to seek this alternative, knowing full well that it may cost them lives—as painfully as in Viet Nam."

PETITION II

"(1) That the Constitution of Georgia, Article III, Section VII, Paragraph 1 provides that each House shall be the judge of the election, returns, and qualifications of its members.

"(2) That the Constitution of Georgia, Article III, Section IV, Paragraph 5, specifically requires each senator and representative, before taking their seat, to take the following oath or affirmation, to-wit:

'I will support the Constitution of this State and of the United States, and on all questions and measures which may come before me, I will so conduct

myself, as will, in my judgment, be most conducive to the interest and prosperity of this State.'

"That the said Julian Bond has specifically and publicly endorsed in full a policy statement of an organization known as the Student Non-Violent Coordinating Committee, which statement reads as follows:

'We are in sympathy with, and support, the men in this country who are unwilling to respond to a military draft which would compel them to contribute their lives to United States aggression in Viet Nam in the name of the 'freedom' we find so false in this country.'

'We recoil with horror at the inconsistency of a supposedly free society where responsibility to freedom is equated with the responsibility to lend oneself to military aggression. We take note of the fact that 16 per cent of the draftees from this country are Negroes called on to stifle the liberation of Viet Nam, to preserve a 'democracy' which does not exist for them at home . . .'

[fol. 264] "We, therefore, encourage those Americans who prefer to use their energy in building democratic forms within this country. We believe that work in the civil rights movement and with other human relations organizations is a valid alternative to the draft. We urge all Americans to seek this alternative, knowing full well that it may cost them their lives—as painfully as in Viet Nam.'

"(4) That the said Julian Bond is not qualified under the Constitution of Georgia to take the oath as a Member of the House of Representatives representing the 136th Representative District of Fulton County, Georgia, inasmuch as his full endorsement of the aforesaid policy statement of the Student Non-Violent Coordinating Committee is totally and completely repugnant to

and inconsistent with the mandatory oath prescribed by the Constitution of Georgia for a Member of the House of Representatives to take before taking his seat.

"(5) That the said Julian Bond cannot justly and honestly take the aforementioned mandatory constitutional oath which requires him to uphold the Constitution of the United States and the Constitution of Georgia, having endorsed the aforesaid subversive policy statement."

At the Committee hearing, the proponents of the contest sought to substantiate their claim by having played into the record a taped newscaster's interview with Mr. Bond which, although not made by him as a public statement upon his own initiative in the normal manner of making a hortatory expression, was made, it may be assumed, with the knowledge that it would be broadcast by the newscaster. The Committee also invited from Mr. Bond his comment. He stated to the Committee that he "did support" the statement of the SNCC, quoted above, in its entirety.

In support of the charge that Bond had "said that he admires the courage of those persons who burn their draft cards", the following question was asked: "Do you admire the courage of persons who burn their draft cards?" after which, the following question and answers occurred:

[fol. 265] "A. I admire people who take an action, and I admire people who feel strongly enough about their convictions to take an action like that knowing the consequences that they will face, and that was my original statement when asked that question.

"Q. Do you still adhere to that statement? A. Yes, I do.

"Q. Let me see if I have your statement correct, that you admire people who are willing to take the consequences, to stand up for their principles, is that substantially what you said? A. That is correct.

"Q. And does that admiration of such people go to taking such a stand, when such a stand is in violation of a valid law of the United States? A. I have never suggested or counseled or advocated that anyone other person burn their draft card. In fact, I have mine in my pocket and will produce it if you wish. I do not advocate that people should break laws. What I simply try to say was that I admired the courage of someone who could act on his convictions knowing that he faces pretty stiff consequences.

"Q. So that you admire the courage of the persons in the given instance who burn their draft cards, or who were willing to take the consequences for burning their draft cards? A. That is right."

In a written response to the charges and during the proceedings Representative Bond stated his willingness and desire to take the oath to support the Constitutions of the United States and the State of Georgia as prescribed by the Georgia Constitution.

It is clear that the refusal to seat this elected representative was upon the charge, adequately proven, of his stated support in an interview with a newsman and subsequently in the corridor of the House of Representatives (after the challenge had been referred to the Committee) of the [fol. 266] SNCC statement and his views touching on the draft card matter.

The suit before us challenges the authority of the House of Representatives, under the provision making it "the Judge of the . . . qualifications of its members" to deny an elected member, the right to be seated for any lack of qualifications not specifically prescribed in the Georgia Constitution. Further, the complaint asserts that the actual ground of his rejection as a member was the disapproval by the House of his conduct, to-wit: the expression of the extremely unpopular (characterized as illegal and disloyal by the proponents of the contest) views as above set out; that a denial of his seat because of such conduct constitutes

an abridgment by the State of Georgia of Bond's freedom of speech in violation of the guarantee of the First Amendment to the United States Constitution, which guarantee is made effective as against State action by "absorption" into the guarantee of due process by the Fourteenth Amendment. See Palko v. Connecticut, 302 U.S. 319, 324, 326.

The complaint requires the convening of a three-judge District court under Title 28, Section 2281, United States Code Annotated, because it charges that if Article III, Section VII, Paragraph 1 of the Georgia Constitution, supra (making each House the judge of the qualifications of its members), is construed in the manner in which it was applied in this case, then the said Section of the Georgia Constitution is invalid under the Fourteenth Amendment. Once convened properly, such a court has jurisdiction to decide every question involved in the litigation, state as well as federal. Missouri v. Brashear Freight Lines, 312 U.S. 621; R.R. Comm. of Calif. v. Pacific Gas & Electric Company, 302 U.S. 388.

[fol. 267] It is a basic principle of jurisprudence that if, by construction of a statute in a manner that will make it constitutional, this avoids the question whether the statute, differently construed, would be unconstitutional, a court should first construe the statute with an eye to the avoiding of the constitutional question if possible. See Rescue Army, et al. v. Municipal Court of Los Angeles, 331 U.S. 549, 568, et seq.

Thus, we look first to determine whether the challenged provision of the Georgia Constitution may properly be construed so as to permit the unseating of Representative-Elect Bond on the grounds stated. Of course, if the Georgia Supreme Court had construed the statute in such a manner this construction of the Georgia Constitution would be binding on us. The Court has not so construed it.

The State of Georgia claims that, at least within the factual context of this contest, the power of the House of Representatives to judge Bond's qualifications is "ple-

nary." It offers, in support of this proposition, three Georgia Court decisions: Rainey v. Taylor, 166 Ga. 476 (1928); Beatty v. Myrick, 218 Ga. 629 (1963); and Fowler v. Bostick, 99 Ga. App. 428 (1959).

In point of fact, in none of these Georgia decisions did the court determine that the House or Senate had absolute and final jurisdiction to judge whether the contesting parties lacked qualifications *which are not expressly stated as "qualifications" or rules of "eligibility" in the Georgia Constitution.*

[fol. 268] The Rainey case dealt with a charge by one Taylor, in a *quo warranto* proceeding against Rainey, that Rainey was, at the time of his election to the Georgia General Assembly, an acting superintendent of Schools. It being provided in the Georgia Constitution that the "qualifications of members" is to be decided by the House of Representatives, and, the Constitution in what is now Section 2-1606, quoted supra, providing that the holder of another state office "shall not have a seat in either House," it was a question for the General Assembly to judge whether Rainey was disqualified under a *stated* ground in the constitution. The Court merely held that a rule of "eligibility" was comprehended within the term "qualifications."

In the subsequent case of Beatty v. Myrick, in a headnote opinion, the Supreme Court of Georgia stated that the question was which of two named candidates was legally *elected* to represent the Third Senatorial District in the State Senate. There was thus no question of testing the "qualifications" of the senator-elect. It was simply a matter of judging who was the winner of the election. This question is expressly confided by the Constitution to the State Senate.

Fowler v. Bostick was in all respects similar to the Rainey case. It was an action for a declaratory judgment seeking to disqualify Bostick as ineligible to be seated as Representative of Tift County because he was, at the time, alleged to hold the office of Clerk of the Superior Court of Tift County. Here, as in Rainey, the court was asked to

determine whether an elected member met the *qualifications expressly stated* in the Georgia Constitution. Of [fol. 269] course, no criticism can be made of such a decision as these three by the Georgia courts. The question, not before the Court there, is whether, under the Georgia Constitution, the Legislature can find a lack of qualifications beyond those *expressly provided* for in the Constitution itself and as set out above.

In the absence of a strong showing of judicial interpretation to the contrary, it would seem that simple justice would require a holding that where specific qualifications are stated for an office and the Legislature is given the power to judge whether an aspirant for the office is "qualified," the legislature, as judge, should be required to look to the stated qualifications as the measuring stick. To hold to the contrary and permit the House as judge to go at large in a determination of whether Representative-Elect "A" meets undefined, unknown and even constitutionally questionable standards shocks not only the judicial, but also the lay sense of justice.

It can be readily understood why there are few legal precedents to give guidance in such a situation. In the first place, it can be assumed that members of a state or national legislature are prone to recognize the right of the electorate to choose as their representative whom they want to serve them. Thus, there may not be expected to be many clear precedents. Further it is readily apparent that in those cases in which a legislative body has exceeded its authority the shortness of the term of office may make moot any contest in court.

Nevertheless, there are some legislative precedents. In a New York state general election held on November 4, 1919, five members of the Socialist party were elected as members of the General Assembly of the State of New [fol. 270] York. They appeared and took the oath of office, and thereupon, as soon as the House was organized, a motion was made to deprive them of their rights to participate, or, in other words, to expel them from membership

in the House. A resolution for such expulsion was submitted and referred to a committee which conducted hearings resulting in a resolution to expel, and the members were later, by action of the Legislature, expelled from membership.

During the pendency of the hearings, the annual meeting of the Association of the Bar of the City of New York adopted a resolution authorizing appointment of a committee "to appear before the Assembly or its Judiciary Committee and take such action as may in their judgment be necessary to safeguard and protect the principles of representative government guaranteed by the Constitution, which are involved in the proceedings now pending."

This Committee, under the Chairmanship of Honorable Charles E. Hughes, a former Governor of the state of New York and a former member of the United States Supreme Court who resigned to be a candidate for the presidency of the United States in the elections in 1916, and who later was reappointed to the Supreme Court of the United States and became Chief Justice, and including in its membership Honorable Joseph M. Proskauer, later an eminent New York Supreme Court Justice, and Honorable Ogden L. Mills, who later became Secretary of the Treasury of the United States, (the other members, Honorable Morgan J. O'Brien and Honorable Louis Marshall, all doubtless men of similar public spirit and competence, but their names do not at the moment call to mind the character of their other public service) filed a careful brief, because, as the Committee said, they regarded "these proceedings as inimical to our institutions, because they tend to subvert [fol. 271] the very foundation upon which they rest—representative government." In the course of the discussion of the situation then pending, the Committee made it plain that the action was an action for expulsion rather than an action to determine the qualifications of the members under the provisions of the New York Constitution similar to that of the State of Georgia. In pointing to the reason why they considered the proceedings not a testing of "the

qualifications" of the members, they cited from the proceedings of the United States Senate, in which Senator Reed Smoot, of Utah, was the subject of proceedings attacking his membership in the United States Senate on the charge that he was one of the twelve apostles of the Mormon Church, and, therefore, a prominent member of the hierarchy, and, though not a polygamist, sanctioned polygamy, a practice prohibited by the organic act of Congress admitting Utah as a state.

In the course of the Smoot proceedings, Senator Philander C. Knox, a distinguished Senator from the state of Pennsylvania, discussed the question of testing the qualifications of a member of the Senate under the United States Constitutional provisions that are similar to those in Article III, Section V, etc., set out above. His statement is a complete answer to the claim that a legislature may require any qualifications it chooses. Senator Knox said:

> "I have intentionally referred to the proposed action against Senator Smoot as expulsion. I do not think the Senate will seriously consider that any question is involved except one of expulsion, requiring a two-thirds vote.[1] There is no question as to Senator Smoot possessing the qualifications *prescribed by the Constitution* and therefore we cannot deprive him of his seat by a majority vote. *He was, at the time of his election, over 30 years of age and had been nine years* [Vol. 272] *a citizen of the United States, and when elected was an inhabitant of Utah. These are the only qualifications named in the Constitution, and it is not in our power to say to the States, 'these are not enough; we require other qualifications,' or to say that we cannot trust the judgment of the states in the selection of Senators, and we, therefore, insist upon the right to disapprove them for any reason. This claim*

[1] Under the United States Constitution, a majority of the Senate could find a Senator not qualified, whereas it required a two-thirds vote to expel a member. This is similar to the Georgia Constitution.

of right to disapprove is not even subject to any rule of the Senate specifying additional qualifications of which the states have notice at the time of selecting their senators, but it is said to be absolute in each case as it arises, uncontrolled by any canon or theory whatever . . . Subject to these limitations imposed by the Constitution, the states are left untrammeled in their right to choose their senators." (Italics supplied.)

The record discloses that the Senate declined to expel or otherwise deny Senator Smoot his right to sit. However, the five members of the New York State Legislature, whose cause was so eloquently presented by the Hughes Committee, did not fare so well. They were denied their seats.

Expressing their own views again on the question of the power of the Legislature to disqualify a member for grounds other than those stated in the Constitution, the Hughes Committee stated:

"We contend that the opinion expressed by Senator Knox in the case of Senator Smoot, supra, correctly defines what is meant by qualification. The constitution expressly specifies a number of disqualifications [as is also true in the Georgia Constitution] . . . The principle of constitutional interpretation applicable to this phase of the subject was elaborated in classic phrase by Chancellor Sanford in Barker v. People, 3 Cowen, 703, which, although decided in 1824, and therefore involving the interpretation of an earlier Constitution, is nevertheless as applicable in principle to the present Constitution: 'Eligibility to public trust, is claimed as a constitutional right, which cannot be abridged or impaired. The Constitution established and defines the right of suffrage; and gives to the electors and to their various authorities, the power to confer public trust . . . *Excepting particular exclusions thus established, the electors and the appointing*

authorities are, by the Constitution, wholly free to confer public stations upon any person, according to their pleasure. The Constitution giving the right of election and the right of appointment; these rights consisting [fol. 273] essentially in the freedom of choice; and the Constitution also declaring, that certain persons are not eligible to office; it follows from these powers and provisions, that all other persons are eligible. Eligibility to office is not declared as a right or principle, by any expressed terms of the Constitution; but it results, as a just deduction, from the expressed powers and provisions of the system. The basis of the principle, is the *absolute liberty of* electors and the appointing authorities, *to choose* and to appoint *any person, who is not made ineligible by the Constitution* . . . I, therefore, conceive it to be entirely clear that the Legislature cannot establish arbitrary exclusions from office or any general regulation requiring qualifications, which the Constitution has not required.' . . . He would be indeed a bold individual who would assert that any American Legislative body can set up an arbitrary standard of qualification of its members that finds no sanction in the general will of the people and that is contrary to the spirit of the Constitution . . ." Brief of Special Committee appointed by the Association of the Bar of the City of New York, January 20, 1920. (Italics supplied.)

A number of actions of the United States House of Representatives or the United States Senate are cited by the State as illustrative in its argument that the term "qualification," is broad enough to encompass a test of the representative elect's general character and loyalty. Based upon the excerpts from these cases as contained in the State's brief, each of them is to be distinguished.

The first of these cases is that of Victor Berger, a Congressman from Wisconsin, who had served in the House from 1911 to 1913. In 1918, he was again elected to the

66th Congress. Before appearing to be sworn in, he was indicted by the grand jury in the United States District Court for the violation of the Espionage Act. He was found guilty and sentenced to 20 years imprisonment. The appeal was pending at the time he offered to take the oath of office in the United States Congress. The House of Representatives adopted the report of the Committee, which found that "the question was 'whether or not Victor L. Berger was guilty of a violation of the Espionage Act, [fol. 274] whether or not he did give aid or comfort to the enemies of the United States during the war with Germany [which, of course, in time of war, would amount to treason under the Constitution of the United States] and whether or not he was ineligible to a seat in the House of Representatives." The Committee found "after a careful consideration of all the evidence, in the opinion of your committee, the admitted acts, writings, and declarations of Victor L. Berger . . . giving such acts in the language of the writings and declarations their ordinary, everyday meaning, and without considering any other evidence, clearly establishes a conscious, deliberate and continuing purpose and intent to obstruct, hinder and embarrass the government of the United States and the prosecution of the war, and thus to give aid and comfort to the enemies of our country. . . ."

The United States Constitution, in describing the crime of treason provides that "the Congress shall have power to declare the punishment of treason," Article III, Chapter 3, Section 3[2]. Congress has determined that one of the punishments for treason is that "Every person so convicted of treason shall, moreover, be incapable of holding any office under the United States." This was the language of the statute that was in effect at the time of Berger's contest. The present counterpart is found in 18 U.S.C.A., §2381, in which it says that a person so convicted "shall be incapable of holding any office under the United States."

Thus, although he had been convicted of sedition and not treason, Berger's rejection by the House of Representatives was on a determination by the House that he had

committed treason, which, if found by a court would be a lack of qualifications prescribed by the United States Constitution. Although in the committee report, it was argued that the House was not limited to constitutionally defined "qualifications" in passing upon Berger's eligibility, never-
[fol. 275] theless the action of the House in rejecting him falls within the pattern of what is permissible under the principles discussed in the Hughes Committee Report, supra. There was no court test of this exclusion.

William Blount, of Tennessee, was *expelled* from the Senate after having been seated. He was expelled "for conduct inconsistent with his public duty, rendering him unworthy of further continuance of his present public trust." This action was taken under the provision of the United States Constitution which authorizes "each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with concurrence of two-thirds, expel a member." Article I, Sec. 5, Clause 2. It has nothing to do with Article I, Section 5, Clause 1, which provides that "each House shall be the judge of the elections, returns and qualifications of its own members. . . ." This is an important distinction because the authority to expel, unlike the provision relating to qualifications, is not limited by any language in the Constitution prescribing the grounds for expulsion.

John Smith, of Ohio, was cited for treason and misdemeanor as an accomplice of Aaron Burr. The Senate voted 19 for expulsion and 10 against. On the resolution failing to secure the necessary two-thirds, Smith retained his seat. Here, again, it was an action of expulsion. It is no precedent for giving "plenary" power to judge qualification.

John M. Niles, of Connecticut, was examined before taking the oath of office as to his mental capacities. The Committee found that he suffered under a mental physical debility, but that he was able to perform his duties, and he was seated. Of course, as noted above, insanity is a qualification by the Georgia Constitution for members of the House and Senate of this State.

[fol. 276] John D. Bright, of Indiana, was expelled because it was found that he had written a certain letter to assist a member of the Confederate states to buy firearms. Note again that this was a matter of expulsion for an act of misconduct while a member and not a matter of determining qualification to be seated.

Joshua Hill and H.V.M. Miller, of Georgia, were refused seats in the United States Senate because of the manner in which the Georgia General Assembly, which had elected Hill and Miller, was conducting its elections. (Of course, *17th E.B.* this was at a time prior to the adoption of the ~~16th~~ Amendment, and senators were elected by the State Legislatures.) This, of course, went directly to the question of judging "the election," which is expressly authorized by the United States and Georgia Constitutions. The Reed Smoot case has been discussed previously. It was again, a question of expelling a senator and not one of passing on his qualifications at the time he presented himself.

The most recent case involved Senator Theodore G. Bilbo, who was not administered the oath pending an investigation of charges that his actions dealing with racial policies were said to be "contrary to the public policy, harmful to the dignity and honor of the Senate, dangerous to the perpetuity of free government, and taint [sic] with fraud and corruption of the credentials."

If a substantial part of the charge was the question of fraud and corruption of the credentials, this, of course, would be a matter of judging "the election," which is specifically authorized. In any event, Senator Bilbo was forced to step aside for an operation and he died before action was taken on his seating.

[fol. 277] In 1926, William S. Vare, of Pennsylvania, and Frank L. Smith, of Illinois, were refused seats for excessive expenditures during their respective election campaigns. Once again this was a question of judging "the election," authority for which is expressly given to the Senate.

If there are other cases involving action by the United States Congress in which it is expressly shown that it has assumed the right to expand the list of qualifications beyond those stated in the United States Constitution, they have not been brought to our attention.

It is quite difficult to ascertain from available materials, which, if any, state cases cited in the briefs of the parties were decided on a basis that explicitly shows that a state House or a state Senate has considered that it can determine a prospective member to be not qualified for grounds other than those stated in the respective constitutions as the qualifications or basis of eligibility for the office.

Representative-Elect Bond was not challenged on the ground that he was not 21 years of age; that he had not been a citizen of the State for the requisite two years and a resident of the county from which he was elected. Nor was he challenged on the ground that he had been convicted of treason against the state, embezzlement of public funds, misfeasance in office, bribery or larceny or any crime punishable by the laws of the state, punishable with imprisonment in the penitentiary. He was not charged with having received any interest, profit or perquisite arising from the use or loan of public funds. He offered to take the prescribed oath of office.

Since it cannot be claimed that he was found disqualified [fol. 278] on some ground other than those of which he was charged, as this would be the clearest sort of deprivation of due process guaranteed not only by the United States Constitution, but also by the Georgia Constitution as well, Article I, Section I, Paragraph III, Constitution of the State of Georgia, Section 2-103, Ga. Code Ann., it is clear that Bond was found disqualified on account of conduct not enumerated in the Georgia Constitution as a basis of disqualification. This was beyond the power of the House of Representatives. It runs counter to the express provisions of the Georgia Constitution giving to the people the right to elect their representatives, and limiting the Legislature in its right to reject such elected members to those grounds which are expressly stated in Georgia's basic document.

As pointed out above, no Georgia decision has held that the courts of this state are helpless to intervene where a House of the Legislature undertakes to disqualify a person on a ground not specified. The decisions thus far reach only the proposition that where the Georgia Constitution authorizes the House to pass upon the qualifications of its members, all of the provisions in the Constitution touching on qualifications may be considered by the House in determining whether a member-elect meets the specified standards. In view of my conclusion that the action of the lower house of the General Assembly was in violation of the State Constitution, it would seem that Article I, Section IV, Paragraph II, would come into play. This section provides: "Legislative Acts in violation of this Constitution, or the Constitution of the United States, are void, and the judiciary shall so declare them." Section 2-402, Ga. Code Ann. Since, therefore, a Georgia court is given the authority to declare such an act void, as in violation of the [fol. 279] Georgia Constitution, pendent jurisdiction places this obligation upon this Court.

While it might be argued that, under normal circumstances, if there were nothing before this Court other than the charge that the State Legislature violated the Georgia Constitution, rules of comity might require that this Court refrain from assuming jurisdiction over such a controversy, this is not such a case. If we were to refrain from acting on the State constitutional question, we would then be faced squarely with the necessity of deciding the grave Federal constitutional question. That question is, whether the plaintiff has been deprived of his First Amendment rights by the action of the Georgia House. The gravity of that question cannot be doubted, since it is clear that it was for expression of his views that Bond was denied his seat. In view of the fact that all of plaintiff's rights can be fully adjudicated by our construction of the Georgia Constitution itself, we need not, and, indeed, we should not, proceed to a consideration of the Federal constitutional issue.

I would find that the act of the Georgia House of Representatives was void as being in violation of the Georgia Constitution and would require that he be seated to the place to which he was elected.

[fol. 280]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION
Civil Action No. 9895

JULIAN BOND, DR. MARTIN LUTHER KING, JR., and MRS. ABEL KEYES, for themselves jointly and severally, and for all other similarly situated, Plaintiffs,

—v.—

JAMES "SLOPPY" FLOYD, WILLIAM J. "BILL" LEE, ED T. FULFORD, J. TERRELL WEBB, W. JONES LANE, and DAVID L. NEWTON, individually and as members of the House of Representatives of the State of Georgia and as Representatives of the class of citizens who are presently serving as members of the House of Representatives of the State of Georgia; GEORGE T. SMITH, individually and as Speaker of the House of Representatives of the State of Georgia and as Chairman of the Rules Committee of the House of Representatives of the State of Georgia and as Chairman of the Challenge Committee appointed to consider the seating of Julian Bond; GLENN W. ELLARD, individually and as Clerk of the House of Representatives of the State of Georgia; MADDOX J. HALL, individually and as Speaker Pro-Tem of the House of Representatives of the State of Georgia; ELMORE C. THRASH, individually and as Messenger of the House of Representatives of the State of Georgia; DAVID PEEPLES, individually and as Doorkeeper of the

[File endorsement omitted]

House of Representatives of the State of Georgia; and BEN W. FORTSON, individually and as Secretary of State of the State of Georgia; and JACK TYSON, individually and as Sheriff of the House of Representatives of the State of Georgia, Defendants.

[fol. 281]

JUDGMENT—Filed and Entered February 16, 1966

On the 17th day of January 1966 a complaint was filed in the United States District Court for the Northern District of Georgia, Atlanta Division, for injunctive relief in the above-styled cause. Pursuant to the prayers of the complaint a Three-Judge District Court was convened, consisting of Honorable Elbert P. Tuttle, Circuit Judge, Griffin B. Bell, Circuit Judge, and Lewis R. Morgan, District Judge. A motion for a preliminary injunction was filed on that same day. Various motions and an answer were filed by the Defendants, and it was stipulated that a final judgment might be rendered on the pleadings, the stipulated facts and such other evidence as was introduced on the hearing of this matter. The Court, having heard oral argument on January 28, 1966, and having entered its opinion with respect thereto on February 10, 1966, and being advised in the premises,

It Is Now, Therefore, Ordered, Adjudged and Decreed as follows:

1.

The motion to dismiss for lack of jurisdiction is denied. The Motion to Strike Plaintiffs Dr. Martin Luther King, Jr., and Mrs. Arel Keyes for Lack of Standing is hereby granted.

2.

The prayers of the complaint are denied for the reasons set forth in the opinion and the complaint is hereby dismissed.

[fol. 282] This 14th day of February 1966.

Griffin B. Bell, United States Circuit Judge.

Lewis R. Morgan, United States District Judge.

I concur in that part of the order denying the motion to dismiss for want of jurisdiction. I dissent from the remainder of the Order.

Elbert P. Tuttle, Circuit Judge.

[fol. 283]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

Civil Action No. 9895

[Title omitted]

NOTICE OF APPEAL OF JULIAN BOND, ET AL. TO THE SUPREME COURT OF THE UNITED STATES—Filed February 16, 1966

[fol. 284] I

Notice is hereby given that Julian Bond, Dr. Martin Luther King, Jr., and Mrs. Arel Keyes, for themselves jointly and severally, and for all others similarly situated, plaintiffs in the above-entitled civil action, hereby appeal to the Supreme Court of the United States, from the final order dated February 10, 1966, and final judgment entered thereon in this action on February 16, 1966, refusing, and denying to issue a preliminary or permanent injunction enjoining the enforcement, operation, and execution of certain constitutional provisions and statutes of the State of Georgia on the grounds of their facial unconstitutionality

[File endorsement omitted]

and their unconstitutional application and denying all other relief and dismissing their complaint.

This appeal is taken pursuant to 28 United States Code, Section 1253.

II

The Clerk will please prepare a transcript of the record in this action, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

A. Complaint and all exhibits thereto.

B. All motions, answers, and other pleadings which have been filed, including this notice of appeal.

[fol. 285] C. Stipulation of facts with all exhibits attached thereto.

D. Transcript of the proceedings before the Court on January 28, 1966, and the two tape recordings offered and received in evidence in said proceedings.

E. Copy of letter of February 1, 1966, to Honorable Ben W. Fortson from counsel for plaintiff Bond.

F. All orders, opinions, and judgments of the three-judge district court including any exhibits thereto and the dissenting opinion of Chief Judge Elbert P. Tuttle entered February 10, 1966.

G. Affidavit of Leon Hayes offered and received into evidence on January 28, 1966.

III

The following questions are presented by this Appeal:

A. Are Article III, Section IV, paragraph 5 and Article III, Section VII, paragraph 1 of the Constitution of the State of Georgia of 1945 (hereinafter Georgia Constitution) void for vagueness under the First and Fourteenth Amendments of the Constitution of the

United States in that they provide no ascertainable standard by which a legislative aspirant, in Georgia, can guide his conduct?

B. Are Article III, Section IV, paragraph 5 and Article III, Section VII, paragraph 1 of the Georgia Constitution void for vagueness under the First and Fourteenth Amendments of the Constitution of the United States in that they provide no ascertainable standard by which the qualified electors of Georgia and more particularly House District 136 therein can judge the qualifications of an aspirant for membership in the Georgia House of Representatives?

[fol. 286] C. Does the application of Article III, Section IV, paragraph 5 and Article III, Section VII, paragraph 1, of the Georgia Constitution as embodied in Rule 61 of the Georgia House of Representatives and Resolution 19 of the Georgia House of Representatives violate Julian Bond's rights to free speech and association guaranteed him by the First and Fourteenth Amendments of the Constitution of the United States?

D. Does the application of Article III, Section IV, paragraph 5 and Article III, Section VII, paragraph 1, of the Georgia Constitution as embodied in Rule 61 of the Georgia House of Representatives and Resolution 19 of the Georgia House of Representatives deprive Julian Bond of rights guaranteed him by the Due Process Clause of the Fourteenth Amendment in that Resolution 19 was based on no evidence or insufficient evidence of his disqualification to serve as a member of the Georgia House of Representatives?

E. Is Resolution 19 of the Georgia House of Representatives barring Julian Bond from his seat in the Georgia House of Representatives unconstitutional as an *ex post facto* law and bill of attainder (pains and

penalties) under Article I, Section 10, of the Constitution of the United States?

F. Does the application of Article III, Section IV, paragraph 5 and Article III, Section VII, paragraph 1, of the Georgia Constitution as embodied in Rule 61 of the Georgia House of Representatives and Resolution 19 of the Georgia House of Representatives deprive the plaintiffs and the class they represent of the republican form of government guaranteed by Article IV, Section IV of the Constitution of the United States?

[fol. 287] G. Does the application of Article III, Section IV, paragraph 5 and Article III, Section VII, paragraph 1, of the Georgia Constitution as embodied in Rule 61 of the Georgia House of Representatives and Resolution 19 of the Georgia House of Representatives deny the plaintiffs and the class they represent of the right to vote as guaranteed them by the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States and the Fifteenth Amendment of said Constitution?

H. Was Julian Bond denied the procedural Due Process of Law guaranteed him by the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States at the hearing of the Special Committee of the Georgia House of Representatives concerning the seating of Representative-elect Julian Bond?

This 16th day of February, 1966.

Respectfully submitted,

Howard Moore, Jr., 859½ Hunter Street, NW, Atlanta, Georgia.

Morris Brown, Healey Building, Atlanta, Georgia.

Of counsel:

Charles Morgan, Jr., 5 Forsyth Street, NW, Atlanta, Georgia.

[fol. 288] Certificate of Service (omitted in printing).

[fol. 289]

In the United States District Court

For the Northern District of Georgia

Atlanta Division

Civil Action Number 9895

Julian Bond, et al., Plaintiffs,

v.

James "Sloppy" Floyd, et al., Defendants.

Transcript of Proceedings—January 28, 1966

Transcript of proceedings had before The Honorable Elbert P. Tuttle, Chief Judge, U. S. Circuit Court of Appeals, The Honorable Griffin B. Bell, Judge, U. S. Circuit Court of Appeals, and The Honorable Lewis R. Morgan, Judge, U. S. District Court, in Atlanta, Fulton County, Georgia, on Friday, January 28, 1966, U. S. District Court Courtroom, commencing at 1:00 o'clock p. m.

Appearances of Counsel:

For the Plaintiffs: Messrs. Howard Moore, Jr., Morris Brown and Charles Morgan.

For the Defendants: Messrs. Arthur K. Bolton, William Harper, Alfred Evans, Peyton Hawes, Jr. and Paul L. Hanes.

* * * * * * * *

[File endorsement omitted]

[fol. 291] Mr. Bolton: Yes, sir. I would like to ask the Court to take judicial notice of certain matters as I think it was agreed at the pre-trial hearing. We would like to ask the Court to take judicial notice of Public Law 88-408 passed by the Eighty-eighth Session of Congress, which was a resolution affirming President Johnson's action in Viet Nam.

We also would like to ask the Court to take judicial notice of the fact that as of today, upon information from the Department of Defense, there were 197,300 men of the U. S. Military Forces stationed in South Viet Nam, that, in addition, there were 70,000 members of the Seventh Fleet Task Force in the Southeast Asia area, that the U. S. Congress for 1965 appropriated for Southeast Asia, Viet Nam in particular, one billion seven hundred million dollars, that there is currently pending before Congress an appropriation of twelve billion seven hundred millions of dollars in emergency funds for Southeast Asia.

Judge Tuttle: We will take all of those facts that you [fol. 292] state to be facts under submission with your request that we give judicial notice to the truth of these facts.

• • • • • • •

[fol. 303] Mr. Moore: —there is another stipulation to which the parties have agreed and that is in the event that plaintiff Bond is ordered to be seated, that the State of Georgia will pay his legislative salary for the year 1966.

Judge Bell: We talked about that, too. That was to avoid making the State Treasurer a party.

Mr. Moore: Yes, sir.

Mr. Bolton: That's right.

Judge Bell: That is true, isn't it, Mr. Bolton?

Mr. Bolton: Correct.

• • • • • • •

[fol. 404] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 405]

SUPREME COURT OF THE UNITED STATES

No. 1125—October Term, 1965

JULIAN BOND, et al., etc., Appellants,

v.

JAMES "SLOPPY" FLOYD, et al.

ORDER NOTING PROBABLE JURISDICTION—June 20, 1966

Appeal from the United States District Court for the Northern District of Georgia.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

June 20, 1966

Mr. Justice Douglas took no part in the consideration or decision of the question of jurisdiction.

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IN THE

Supreme Court of the United States

October Term, 1965

No. 1125 87

JULIAN BOND, DR. MARTIN LUTHER KING, JR., and MRS. AREL KEYES, for themselves jointly and severally, and for all others similarly situated,

Appellants,

v.

JAMES "SLOPPY" FLOYD, WILLIAM J. "BILL" LEE, ED T. FULFORD, J. TERRELL WEBB, W. JONES LANE, and DAVID L. NEWTON, individually and as members of the House of Representatives of the State of Georgia and as Representatives of the class of citizens who are presently serving as members of the House of Representatives of the State of Georgia; GEORGE T. SMITH, individually and as Speaker of the House of Representatives of the State of Georgia and as Chairman of the Rules Committee of the House of Representatives of the State of Georgia and as Chairman of the Challenge Committee appointed to consider the seating of Julian Bond, et al.,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA (ATLANTA DIVISION)

JURISDICTIONAL STATEMENT AND MOTION TO ADVANCE

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IN THE

Supreme Court of the United States

October Term, 1965

No.

JULIAN BOND, DR. MARTIN LUTHER KING, JR., and MRS. AREL KEYES, for themselves jointly and severally, and for all others similarly situated,

Appellants,

v.

JAMES "SLOPPY" FLOYD, WILLIAM J. "BILL" LEE, ED T. FULFORD, J. TERRELL WEBB, W. JONES LANE, and DAVID L. NEWTON, individually and as members of the House of Representatives of the State of Georgia and as Representatives of the class of citizens who are presently serving as members of the House of Representatives of the State of Georgia; GEORGE T. SMITH, individually and as Speaker of the House of Representatives of the State of Georgia and as Chairman of the Rules Committee of the House of Representatives of the State of Georgia and as Chairman of the Challenge Committee appointed to consider the seating of Julian Bond; GLENN W. ELLARD, individually and as Clerk of the House of Representatives of the State of Georgia; MADDOX J. HALE, individually and as Speaker Pro-Tem of the House of Representatives of the State of Georgia; ELMORE C. THRASH, individually and as Messenger of the House of Representatives of the State of Georgia; DAVID PEEPLES, individually and as Doorkeeper of the House of Representatives of the State of Georgia; and BEN W. FORTSON, individually and as Secretary of State of the State of Georgia; and JACK TYSON, individually and as Sheriff of the House of Representatives of the State of Georgia.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA (ATLANTA DIVISION)

Jurisdictional Statement

Julian Bond, Martin Luther King, Jr. and Arel Keyes, the appellants, having appealed from the order and judg-

ment, dated February 14, 1966, of the three-judge court of the United States District Court for the Northern District of Georgia, Atlanta Division, which (i) denied their application for a permanent injunction, (ii) dismissed appellants King and Keyes as parties for lack of standing, and (iii) dismissed the complaint of appellant Bond, submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Appellants have also moved to advance the argument in this case, *infra*, p. 12.

Opinions Below

The opinions below (R. 234-279) have not as yet been reported, and are set forth in the Appendix, *infra*, pp. 18 to 66.

Jurisdiction

Appellants brought this action in the United States District Court for the Northern District of Georgia for a judgment (i) enjoining the defendants from excluding the appellant Bond from membership in the House of Representatives of the General Assembly of Georgia, to which he was elected on June 16, 1965, (ii) enjoining the enforcement of certain provisions of the Georgia Constitution and a Rule and Resolution of the Georgia House of Representatives, and (iii) declaring that the said constitutional provisions, legislative action and exclusion from office are uncontitutional.

The action was brought under Article I, Section 10 and under Article IV, Section 4 of the United States Constitution, and the First, Fifth, Sixth, Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution; 28 U. S. C. §§ 1331, 1343(3) and (4), 2201 and 2281; and 42 U. S. C. §§ 1971, 1983 and 1988.

The judgment below was made on February 14, 1966 and entered on February 16, 1966 (*infra*, p. 68). The notice of appeal was filed in the district court on February 16, 1966 (R. 283-88).

Jurisdiction of this appeal is conferred by 28 U. S. C. § 1253. The following cases sustain the Court's jurisdiction: *Baker* v. *Carr*, 369 U. S. 186; *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U. S. 715; *Florida Lime and Avocado Growers* v. *Jacobsen*, 362 U. S. 73.

Constitutional Provisions and Statutes Involved

The provisions of the Georgia Constitution involved in this case are as follows:

> Article III, Section VII, Paragraph I (§ 2-1901, Ga. Code Ann.), making the House "the judge of the election, returns and qualifications of its members", *infra*, p. 14.
>
> Article III, Section VI, Paragraph I (§ 2-1801, Ga. Code Ann.), setting forth the members' qualifications, *infra*, p. 14.
>
> Article III, Section IV, Paragraph V (§ 2-1605, Ga. Code Ann.), specifying the oath of office of representatives, *infra*, p. 14.

The following provisions of the Georgia Constitution setting forth the disqualifications for office are also involved in this case.

> Article II, Section II, Paragraph I (§ 2-801, Ga. Code Ann.), *infra*, p. 15.
>
> Article III, Section IV, Paragraph VI (§ 2-1606, Ga. Code Ann.), *infra*, p. 15.
>
> Article VII, Section III, Paragraph VI (§ 2-5606, Ga. Code Ann.), *infra*, p. 16.

The legislative actions involved in this case are as follows:

House Rule 61 of the Georgia House of Representatives adopting the provisions of Article III, Section VII of the Georgia Constitution, *infra*, p. 16.

House Resolution 19 of January 10, 1966, excluding Mr. Bond from office, *infra*, pp. 16-17.

Questions Presented

1. Did the exclusion from elected legislative office of the appellant Julian Bond solely because of his public statements on issues of national concern impair his freedom of speech under the First and Fourteenth Amendments.

2. Did that exclusion from office disenfranchise Mr. Bond's constituents in violation of the due process and equal protection clauses of the Fourteenth Amendment.

3. Does House Resolution 19 disqualifying Mr. Bond from his elected office constitute an *ex post facto* law or a bill of attainder in violation of Article I, Section 10 of the United States Constitution.

4. Are the provisions of the Georgia Constitution and statutes, as interpreted by the court below, unconstitutionally vague under the Fourteenth Amendment.

Statement of the Case

Appellant Julian Bond was elected on June 16, 1965 to the Georgia House of Representatives as the Representative from the 136th House District, Fulton County, Georgia, for the term expiring January 1, 1967 (R. 293). This district was created pursuant to legislation enacted following the reapportionment decision of the court below in *Toombs* v.

Fortson, 241 F. Supp. 65 (N. D. Ga. 1965). Mr. Bond received 82 per cent of the votes cast in an overwhelmingly Negro district.[1]

Mr. Bond, a pacifist and Negro, is also the Communications Director of the Student Non-Violent Coordinating Committee (herein called SNCC), an association dedicated to racial equality through non-violence.

The other appellants are constituents of Mr. Bond and sued as representatives of that class in the district. Mrs. Arel Keyes voted in the election for Mr. Bond; Dr. Martin Luther King, Jr., a former resident of the district, transferred his voting residence to it on January 24, 1966.

The defendant members, employees and officers of the state government, excluded Mr. Bond from his elected office and rejected his offer to take the oath of office because of statements he made when interviewed by the press, *viz.* that he supported a SNCC statement critical of American involvement in the war in Vietnam; that when asked for his views on the burning of draft cards, he "stated he would not burn his own but admired the courage of those who did" and that as a pacifist he supported the opposition of others to the war (*infra*, pp. 23-24).

By reason of these statements, exclusion proceedings against Mr. Bond were conducted by the Georgia House of Representatives upon petitions charging, *inter alia*, that "Mr. Bond's actions and statements gave aid and comfort to the enemies of the United States, and also violated the

---

[1] In a subsequent election conducted on February 23, 1966 Mr. Bond was reelected without opposition. A few minutes before adjournment on February 18, 1966 the House amended its rules and authorized its speaker to appoint a committee during the House recess to determine election contests.

[2] The SNCC statement is set forth in full in the majority opinion below (*infra*, pp. 21-23).

Selective Service Laws, 50 App. U. S. C. A. § 462(a) and (b), and tended to bring discredit and disrespect on the House of Representatives" (*infra*, p. 24). It was also charged "that the statements and views of Mr. Bond disqualified him to take the oath to support the Constitution of the United States and the Constitution of Georgia, as is required of a member of the House of Representatives" (*infra*, p. 25).

Hearings were conducted before a special committee of the House which, by majority report, recommended that Mr. Bond be excluded (*infra*, p. 19). The House, adopting that report, excluded him by passing House Resolution 19 by majority vote on January 10, 1966 (*infra*, p. 19).

Mr. Bond and his constituents thereupon instituted this action for injunctive relief and a declaratory judgment that the legislature's action was unauthorized by the state Constitution and violated their rights under the federal Constitution. A three-judge court was convened under 28 U. S. C. 2281.

On February 14, 1966, the court rendered final judgment against the appellants. It unanimously held that it had jurisdiction because the plaintiffs had asserted substantial First Amendment rights (*infra*, p. 37). The court, Chief Judge Tuttle dissenting, struck from the complaint the names of the appellants other than Mr. Bond on the ground that they lacked "such a direct interest in the litigation as would give them standing to bring the complaint" (*infra*, p. 27).[3]

On the merits, the court was also divided. The majority agreed that "[t]he substantial issue in the case rests on the guaranty of freedom of speech or to dissent under the

[3] It held, too, that Dr. King, although a resident, was not a registered voter (*ibid.*).

First Amendment as that amendment has long been applicable to the state under the due process clause of the Fourteenth Amendment" (*infra*, p. 28). Nevertheless, it held that "his [Bond's] statements and affirmation of the SNCC statement as they bore on the functioning of the Selective Service System could reasonably be said to be inconsistent with and repugnant to the oath which he was required to take" (*infra*, p. 40).

Chief Judge Tuttle, dissenting, was of the view that since substantial federal constitutional issues of freedom of speech were involved, the court was under a duty to construe the Georgia constitutional provisions "with an eye to the avoiding of the constitutional question if possible" (*infra*, p. 54). He concluded that the Constitution explicitly stated the qualifications for legislative office, which were met by Mr. Bond, and could not be construed to authorize rejection from elected office for a reason not specified, *viz.*, for making a lawful public statement upon foreign affairs (*infra*, p. 65).

The Questions Are Substantial

1. This is the first case before the Court in which a legislative body has refused to seat an elected representative because of his public expression of opinion. Significant precedents, never subjected to judicial review, are authoritatively recognized as raising important questions of freedom of speech and of franchise.[4]

The belief of the majority below that the "SNCC statement is at war with the national policy of this country"

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[4] John Wilkes in 1768 (See Chafee, *Free Speech in the United States* [1941], 242-247.); Victor L. Berger in 1919 (See Chafee, 247-269.); *In the Matter of Louis Waldman, August Claessens, Samuel A. De Witt, Samuel Orr and Charles Solomon* (before the Assembly Judiciary Committee, New York State Legislature), *Brief of Special Committee Appointed by the Association of the Bar of the City of New York*, headed by former Justice (later Chief Justice) Hughes. (See also Chafee, 269-282.)

(*infra*, p. 38) conflicts with our conception of a democratic society; see *Grosjean* v. *American Press Co.*, 297 U. S. 233, 247, 250. Its view that the legislature's interference could be justified as having "a rational evidentiary basis" (*infra*, p. 37) incorrectly assumes that the freedom of speech of an elected legislator depends not upon the First Amendment but upon the judgment of his colleagues. There is no suggestion in this case of any danger which could justify a direct impairment of First Amendment rights. See, *e.g.*, *Whitney* v. *California*, 274 U. S. 357, 372 (Mr. Justice Brandeis, concurring opinion); *Thomas* v. *Collins*, 323 U. S. 516, 530.

The reference of the majority below to a "rational evidentiary basis" may have been based upon the unarticulated assumption that the interference with speech was only indirect. But the application of even this test could not support the exclusion of Mr. Bond from elected office and the resulting interference with his constituents' exercise of their right to vote. There was no rational basis for the legislature's action under the critical factual analysis employed by this Court in analogous situations; *Konigsberg* v. *State Bar of California*, 353 U. S. 252; *Schware* v. *Board of Bar Examiners of New Mexico*, 353 U. S. 232; *In re Sawyer*, 360 U. S. 622. The impairment of free speech cannot be veiled by a reference to the doctrines of "separation of powers" and "our system of federalism" *infra*, p. 35. First, the supremacy clause is an equally controlling doctrine, see *Pennsylvania* v. *Nelson*, 350 U. S. 497; second, there is "a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open." *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 270; see also *Kingsley Int'l Pictures Corp.* v. *Regent*, 360 U. S. 684, 688-689. If the legislature's conduct impairs constitutional rights, the doctrines enunciated by the court below are no defense. To hold otherwise is to reject federal judicial review of state unconstitutional action.

The SNCC statement pales before expressions on the same subject by some of the most distinguished public figures.[5] Its suggestion of exemption for conscientious objectors and of alternative civilian work is already law; see 50 U. S. C. 456(j); *United States* v. *Seeger*, 380 U. S. 163. The SNCC statement was lawful; so was Mr. Bond's approval of it. In any event, he could not be disqualified for office, absent a criminal conviction in court, Georgia Constitution, Article II, Section II, Paragraph I (*infra*, p. 15).[6]

2. Mr. Bond as an elected legislator had an enhanced right and a duty to his constituents to speak out on public issues even if his views had not been solicited by the press; see *Garrison* v. *Louisiana*, 379 U. S. 64.[7] An elected representative must communicate freely with his constituents as well as engage in legislative debate. He does not enjoy the ordinary citizen's prerogative of silence. To circumscribe the legislator's rights, as did the Georgia legislature, is to interfere with representative democracy and equal protection of the laws under the Fourteenth Amendment in no less degree than by the malapportionment which has been the subject of this Court's recent decisions; see, *e.g.*, *Baker* v. *Carr*, *supra*.[8]

---

[5] See, *e.g.*, Senator Wayne Morse in 111 Cong. Rec. 25420-22 (daily ed. Oct. 19, 1965); Circuit (formerly Chief) Judge Henry W. Edgerton in *The New Republic*, May 22, 1965; *The New York Times*, November 14, 1962, p. 38; August 9, 1964, Sec. IV, p. 8.

[6] Mr. Bond's statement to the legislative committee that he never advocated "that people should break laws" (*infra*, p. 53) is not questioned by the court below.

[7] See also *United States* v. *Johnson*, No. 25, Oct. Term, 1965, emphasizing the need to protect legislators' freedom in matters affecting their special responsibilities.

[8] While this is a sufficient federal question under *Baker* v. *Carr*, *supra*, appellants would also urge, at least in the present context, reconsideration of the Court's view that the impairment of the constitutional guaranty of a republican form of government, under Article IV, § 4, does not raise a justiciable question.

The conception that the majority of a legislature possesses a veto power over the choice of the electorate is to reject "the essence of constitutional representative government."[9] Nor can the majority secure this veto obliquely by denying the member-elect the privilege of taking the oath "because of any alleged opinion, state of mind or intent, claimed to be inconsistent with the oath" (*ibid.*).

The majority was also in error in ruling that Mr. Bond's constituents lacked standing to sue (*infra*, pp. 26-27). They were proper parties under this Court's decisions because Mr. Bond's expulsion deprived his co-appellants and their class in violation of the equal protection clause of representation in the Georgia House of Representatives.

3. House Resolution 19, excluding Mr. Bond from office, is an *ex post facto* law and a bill of attainder prohibited by Article I, Section 10 of the Constitution. It is a legislative act in the classic sense, although promulgated by a single house of the legislature.[10] It singles out an individual because of imputed past misdeeds of a political nature, stigmatizes him as disloyal, and punishes him by expulsion from office and his constituents by loss of suffrage. The resolution is plainly unconstitutional under the Court's decisions on bills of attainder and *ex post facto* laws; *United States* v. *Brown*, 381 U. S. 437; *Ex parte Garland*, 4 Wall. (71 U. S.) 333; *Cummings* v. *Missouri*, 4 Wall. (71 U. S.) 277; *United States* v. *Lovett*, 328 U. S. 303; *Lindsey* v. *Washington*, 301 U. S. 397.

4. There was sound basis for Chief Judge Tuttle's dissenting view that the exclusion of Mr. Bond was not authorized by the state Constitution and statute (*infra*, p. 65). This construction of state law was impelled by the need to avoid "deciding the grave federal question" (*infra*, p. 66). *Cf. United States* v. *Rumely*, 345 U. S. 41. Its adoption below would have required judgment in appellants' favor

[9] See the Brief of Special Committee, pp. 4, 9, referred to in footnote 4.

[10] See *United States* v. *Lovett*, *infra*, at p. 315.

since the district court correctly held that it had jurisdiction.

The majority's contrary interpretation of Georgia law raises a serious question of vagueness under the Fourteenth Amendment. It would turn precise qualifications for office [11] into an unlimited discretion by a legislative majority to determine qualifications on an *ad hoc* basis. It would turn a constitutionally prescribed promissory oath [12] into a license to investigate the member's associations and beliefs. The perniciousness of vagueness in the First Amendment area, particularly where the oath restricts political expression, is obvious, *Cramp* v. *Board of Public Instruction*, 368 U. S. 278; *Baggett* v. *Bullitt*, 377 U. S. 360. The injury is magnified when one considers the historically dangerous effect of the test oath for public office. As applied here, it negates the electoral decision of the people and usurps their inherent censorial power over their elected representatives.

CONCLUSION

The questions are substantial and the Court should note probable jurisdiction.

Respectfully submitted,

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Attorneys for Appellants.

March, 1966.

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[11] Article III, Section VII, Paragraph I of the Georgia Constitution, *infra*, p. 14, and House Rule 61, *infra*, p. 16.

[12] Article III, Section IV, Paragraph V of the Georgia Constitution, *infra*, p. 14.

IN THE

Supreme Court of the United States

October Term, 1965

No.

JULIAN BOND, DR. MARTIN LUTHER KING, JR., and MRS. AREL KEYES, for themselves jointly and severally, and for all others similarly situated,

Appellants,

v.

JAMES "SLOPPY" FLOYD, *et al.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA (ATLANTA DIVISION)

Motion to Advance

Pursuant to Rule 48 of the Rules of this Court, appellants respectfully move this Court (i) to reduce the appellees' time to move under Rule 16(1), (ii) to advance the case for argument to the week of May 2, 1966, if the Court notes probable jurisdiction or postpones consideration of jurisdiction, and (iii) to dispense with the printing of the record.

The reason for this application is the extraordinary public importance of this case. Both state and federal elections will be held this Fall in which candidates should not be threatened with disqualification either for expressing their views or as a device for evading federal court decisions and the Voting Rights Act of 1965, Pub. L. No. 110,

89th Cong., 1st Sess. There is also a continuing and irreparable injury to appellants by reason of Mr. Bond's continued exclusion from office. While the general session of the legislature ended on February 18, 1966, its standing committees continue to function and there is a strong probability that a special legislative session will be called by the Governor by reason of motions now pending in *Toombs* v. *Fortson,* 241 F. Supp. 65 (N. D. Ga. 1965).

Unless this case is advanced it is not likely to be decided on the merits before the expiration of Mr. Bond's term of office on December 31, 1966 and hence may be mooted. An early decision by the Court will prevent protracted litigation which may otherwise result from repeated elections of Mr. Bond and rejections by the legislature.

Since the only issues, those of law, are adequately presented by the opinions below, the printing of the record is unnecessary.

WHEREFORE, appellants respectfully pray that the Court grant this motion to advance.

Respectfully submitted,

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Attorneys for Appellants.

March, 1966.

APPENDIX A

Constitution and Legislative Acts

Article III, Section VII, Paragraph I, of the Georgia Constitution provides in pertinent part as follows:

> "Election, returns, etc.; disorderly conduct.—Each House shall be the judge of the election, returns, and qualifications of its members and shall have power to punish them for disorderly behavior, or misconduct, by censure, fine, imprisonment, or expulsion, but no member shall be expelled, except by a vote of two-thirds of the House to which he belongs." (2-1901, Ga. Code Ann.)

Article III, Section VI, Paragraph I, of the Georgia Constitution provides in pertinent part as follows:

> "Qualifications of representatives.—The Representatives shall be citizens of the United States who have attained the age of twenty-one years, and who shall have been citizens of this State for two years, and for one year residents of the counties from which elected. (2-1801, Ga. Code Ann.)

Article III, Section IV, Paragraph V, of the Georgia Constitution provides in pertinent part as follows:

> "Oath of members.—Each senator and representative, before taking his seat, shall take the following oath, or affirmation, to wit: 'I will support the Constitution of this State and of the United States, and on all questions and measures which may come before me, I will so conduct myself, as will, in my judgment, be most conducive to the interests and prosperity of this State." (2-1605, Ga. Code Ann.)

Article II, Section II, Paragraph I, of the Georgia Constitution provides in pertinent part as follows:

> "Registration of electors; who disfranchised.—The General Assembly may provide, from time to time, for the registration of all electors, but the following classes of persons shall not be permitted to register, vote, or hold any office, or appointment of honor, or trust in this State, to wit: 1st. Those who shall have been convicted in any court of competent jurisdiction of treason against the State, of embezzlement of public funds, malfeasance in office, bribery or larceny, or of any crime involving moral turpitude, punishable by the laws of this State with imprisonment in the penitentiary, unless such persons shall have been pardoned. 2nd. Idiots and insance persons." (2-1801, Ga. Code Ann.)

Article III, Section IV, Paragraph VI, of the Georgia Constitution provides in pertinent part as follows:

> "Eligibility; appointments forbidden.—No person holding a military commission, or other appointment, or office, having an emolument, or compensation annexed thereto, under this State, or the United States, or either of them except Justices of the Peace and officers of the militia, nor any defaulter for public money, or for any legal taxes required of him shall have a seat in either house; nor shall any Senator, or Representative, after his qualification as such, be elected by the General Assembly, or appointed by the Governor, either with or without the advice and consent of the Senate, to any office or appointment having any emolument annexed thereto, during the time for which he shall have been elected, unless he shall first resign his seat, provided, however, that during the term for which he was elected

no Senator or Representative shall be appointed to any civil office which has been created during such term." (2-1601, Ga. Code Ann.)

Article VII, Section III, Paragraph VI, of the Georgia Constitution provides in pertinent part as follows:

"Profit on public money.—The receiving, directly or indirectly, by any officer of State or county, or member or officer of the General Assembly of any interest, profits or perquisites, arising from the use or loan of public funds in his hands or moneys to be raised through his agency for State or county purposes, shall be deemed a felony, and punishable as may be prescribed by law, a part of which punishment shall be a disqualification from holding office." (2-5606, Ga. Code Ann.)

House Rule 61 of the Georgia House of Representatives provides in pertinent part as follows:

"Each house shall be the judge of the election, returns, and qualifications of its members and shall have power to punish them for disorderly behavior, or misconduct, by censure, fine, imprisonment, or expulsion; but no member shall be expelled, except by a vote of two-thirds of the House to which he belongs."

House Resolution 19 of January 10, 1966 of the Georgia House of Representatives provides in pertinent part as follows:

"Relative to the matter of the seating of Representative-Elect Julian Bond; and for other purposes.

"WHEREAS, a special committee created pursuant to H.R. No. 7 which was appointed for the purpose

of holding a hearing on petitions challenging and contesting the seating of Representative-Elect Julian Bond of the 136th District has conducted a hearing in said matter; and

"WHEREAS, said committee has submitted a report in which it is recommended that Representative-Elect Julian Bond not be allowed to take the oath of office as a Representative of the House of Representatives and that he not be seated as a member of the House of Representatives.

"NOW, THEREFORE, BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES that the report of the aforesaid committee is hereby adopted and the recommendations contained therein shall be followed.

"BE IT FURTHER RESOLVED that Representative-Elect Julian Bond shall not be allowed to take the oath of office as a member of the House of Representatives and that Representative-Elect Julian Bond shall not be seated as a member of the House of Representatives.

"BE IT FURTHER RESOLVED that the Clerk of the House is hereby instructed to immediately transmit a copy of the aforesaid report and a copy of this resolution to the Governor, to the Secretary of State and to Representative-Elect Julian Bond."

APPENDIX B

Opinions Below

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

Civil Action No. 9895

JULIAN BOND, DR. MARTIN LUTHER KING, JR., and MRS. AREL KEYES, for themselves jointly and severally, and for all others similarly situated,

Plaintiffs,

v.

JAMES "SLOPPY" FLOYD, *et al.*,

Defendants.

Before TUTTLE and BELL, *Circuit Judges*, and MORGAN, *District Judge*.

BELL, *Circuit Judge* and MORGAN, *District Judge*:

OPINION AND ORDER

Mr. Bond, one of the plaintiffs in this matter and a Negro, was refused his seat as a member of the House of Representatives of the General Assembly of Georgia. He was a Representative-elect, having been duly elected by the voters of House District No. 136 for the session of the General Assembly commencing January 10, 1966. This

was a special election for a one year term made necessary by the reapportionment decision of this court. *Toombs* v. *Fortson*, N. D., Ga., 1965, 241 F. Supp. 65.

On the first day of the session, at which time Mr. Bond and other members of the House were to take the oath of office, Mr. Bond was asked to step aside because of challenges to his qualifications having been filed by seventy-five of the two-hundred-five members of the House. After the other members were sworn, including seven Negro representatives, petitions protesting the seating of Representative-Elect Bond were referred by the Speaker of the House to a special committee designated to hear the contest. This committee, after a hearing, recommended that he not be seated. This recommendation was accepted by the House and he was denied his seat by a vote of one hundred eighty-four to twelve.

Dr. King and Mrs. Keyes, the other plaintiffs, seek along with Mr. Bond to represent the citizens and voters of House District No. 136 as a class, and it is affirmatively alleged that they are Negro citizens of House District No. 136 and that they are registered voters. They allege that there are common questions of law and fact affecting the civil rights of Negroes to vote and to have members of their race represent them in the House of Representatives of the State of Georgia. It is undisputed that Dr. King and Mrs. Keyes are residents of the district, but it is also undisputed that Dr. King is not registered to vote in the district but in the House District No. 132.

The defendants are the Speaker of the House, the Speaker Pro-Tem, several members of the House representing the membership, certain officers of the House, and the Secretary of State of the State of Georgia. Jurisdiction for declaratory and injunctive relief is asserted under 28 USCA, §§ 1331, 1343(3), 1343(4), and 2201; and 42 USCA, §§ 1971(d), 1983, and 1988. Three-Judge District Court jurisdiction was premised on 28 USCA, § 2281 by a claim

that the provision of the Georgia Constitution which permits the members of the House to judge the qualifications of its members, and House Rule 61 which embodies the same provision are unconstitutionally vague, or were unconstitutionally administered with respect to Mr. Bond.

The additional causes of action set forth in the complaint were refined by briefs into claims that Mr. Bond was barred from membership because he was a Negro; that the action of the House denied him his First Amendment right to free speech; that he was denied procedural due process as guaranteed by the due process clause of the Fourteenth Amendment; that he was denied substantive due process in that there was no rational basis for the action of the House; that the House resolution barring Mr. Bond constituted an *ex post facto* law and a bill of attainder; and that the House action deprived the residents of the House District No. 136 of a republican form of government, equal protection of the law under the Fourteenth Amendment, and the right as Negroes under the Fifteenth Amendment to vote. The prayer is that defendants be enjoined from excluding Mr. Bond from membership in the House.

The defendants, by motion, have denied the jurisdiction of the court. Additionally, in the alternative, they have moved to dismiss Dr. King and Mrs. Keyes as plaintiffs. They have also answered the complaint. It was stipulated that a final judgment might be rendered on the pleadings, the stipulated facts and such other evidence as was introduced on the hearing of this matter. We thus proceed to final disposition.

The facts which gave rise to the challenge to Mr. Bond stem from a statement issued on January 6, 1966 by the Student Nonviolent Coordinating Committee, an organization active in the civil rights field. Mr. Bond is and was Communications Director of this organization. After the statement was issued, Mr. Bond, upon inquiry, advised the news media that he supported the statement in its entirety.

He added that he admired the courage of persons who burned their draft cards; that he was a pacifist who was eager and anxious to encourage people not to participate in the war in Viet Nam for any reason that they might choose; and said that as a second class citizen he did not feel that he should be required to support the war in Viet Nam.

The SNNC statement follows in full:

> "The Student Nonviolent Coordinating Committee has a right and a responsibility to dissent with United States foreign policy on an issue when it sees fit. The Student Nonviolent Coordinating Committee now states its opposition to United States' involvement in Viet Nam on these grounds:
>
> "We believe the United States government has been deceptive in its claims of concern for freedom of the Vietnamese people, just as the government has been deceptive in claiming concern for the freedom of colored people in such other countries as the Dominican Republic, the Congo, South Africa, Rhodesia and in the United States itself.
>
> "We, the Student Nonviolent Coordinating Committee, have been involved in the black people's struggle for liberation and self-determination in this country for the past five years. Our work, particularly in the South, has taught us that the United States government has never guaranteed the freedom of oppressed citizens, and is not yet truly determined to end the rule of terror and oppression within its own borders.
>
> "We ourselves have often been victims of violence and confinement executed by United States government officials. We recall the numerous persons who have been murdered in the South because of their efforts to secure their civil and human rights,

and whose murderers have been allowed to escape penalty for their crimes.

"The murder of Samuel Young in Tuskegee, Ala., is no different than the murder of peasants in Viet Nam, for both Young and the Vietnamese sought, and are seeking, to secure the rights guaranteed them by law. In each case the United States government bears a great part of the responsibility for these deaths.

"Samuel Young was murdered because United States law is not being enforced. Vietnamese are murdered because the United States is pursuing an aggressive policy in violation of international law. The United States is no respecter of persons or law when such persons or laws run counter to its needs and desires.

"We recall the indifference, suspicion and outright hostility with which our reports of violence have been met in the past by government officials.

"We know that for the most part, elections in this country, in the North as well as the South, are not free. We have seen that the 1965 Voting Rights Act and the 1964 Civil Rights Act have not yet been implemented with full federal power and sincerity.

"We question, then, the ability and even the desire of the United States government to guarantee free elections abroad. We maintain that our country's cry of 'preserve freedom in the world' is a hypocritical mask behind which it squashes liberation movements which are not bound, and refuse to be bound, by the expediencies of United States cold war policies.

"We are in sympathy with, and support, the men in this country who are unwilling to respond to a military draft which would compel them to contribute their lives to United States aggression in Viet Nam

in the name of the 'freedom' we find so false in this country.

"We recoil with horror at the inconsistency of a supposedly 'free' society where responsibility to freedom is equated with the responsibility to lend oneself to military aggression. We take note of the fact that 16 percent of the draftees from this country are Negroes called on to stifle the liberation of Viet Nam, to preserve a 'democracy' which does not exist for them at home.

"We ask, where is the draft for the freedom fight in the United States?

"We therefore encourage those Americans who prefer to use their energy in building democratic forms within this country. We believe that work in the civil rights movement and with other human relations organizations is a valid alternative to the draft. We urge all Americans to seek this alternative, knowing full well that it may cost them lives—as painfully as in Viet Nam."

On the same day a newspaper reporter asked Mr. Bond for his views on the subject of the burning of draft cards. He stated that he would not burn his own but admired the courage of those who did.

During a taped interview with a representative of the media, Mr. Bond, after endorsing the SNCC statement was asked why he endorsed it, and his answer was as follows:

"Why, I endorse it, first, because I like to think of myself as a pacifist and one who opposes that war and any other war and eager and anxious to encourage people not to participate in it for any reason that they choose; and secondly, I agree with this statement because of the reason set forth in it—because I think it is sorta hypocritical for us to main-

tain that we are fighting for liberty in other places and we are not guaranteeing liberty to citizens inside the continental United States."

When asked if he thought his views were at variance with the duties that might be required of him as a Representative in the House of Representatives of the State of Georgia, Mr. Bond replied:

"Well, I think that the fact that the United States Government fights a war in Viet Nam, I don't think that I as a second class citizen of the United States have a requirement to support that war. I think my responsibility is to oppose things that I think are wrong if they are in Viet Nam or New York, or Chicago, or Atlanta, or wherever."

These facts were introduced before the House committee hearing the challenge. Mr. Bond was represented by counsel at the hearing and testified. He reaffirmed his adherence to all of these statements at the hearing and stated that they were still his views. There was no evidence then nor at the hearing before this court that Mr. Bond had receded in any way from his views. However, by way of explanation, he did state to the House committee that he had never suggested or advocated that anyone burn his draft card. He stated his willingness and desire to take the prescribed oath to support the Constitution of the United States and the State of Georgia.

The petitions challenging Mr. Bond which were before the special committee of the House contain several grounds, including the contention that Mr. Bond's actions and statements gave aid and comfort to the enemies of the United States, and also violated the Selective Service laws, 50 App., USCA, § 462(a) and (b), and tended to bring discredit and disrespect on the House of Representatives.

The challenge was also on the basis that the statements and views of Mr. Bond disqualified him to take the oath to support the Constitution of the United States and the Constitution of Georgia as is required of a member of the House of Representatives. The theory was that Mr. Bond's statements were so repugnant to and inconsistent with his oath as to make it apparent that he could not honestly take the oath. This theory presents the central issue in the case.

PENDING MOTIONS

Defendants moved to dismiss the complaint on the ground that the court lacks jurisdiction over the subject matter. Their view is that the determination of the qualifications of a member of the State House of Representatives is a matter which state law vests in the sole and exclusive jurisdiction of the House of Representatives, and that the federal questions asserted are insubstantial. They urge that the absence of any substantial question concerning deprivation of federally protected rights indicates that the action of the House is not subject to federal judicial review.

The extent of review under the circumstances will be discussed hereinafter under the merits of the controversy. *However, we do hold that the court has jurisdiction over the subject matter of the complaint.* It could hardly be argued that the House could refuse to seat a member because of his race or for any other reason amounting to an invidious discrimination under the equal protection clause of the Fourteenth Amendment. Cf. *Baker* v. *Carr*, 1962, 369 U. S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663. The denial of a seat to a Negro representative-elect would also violate the Fifteenth Amendment. Cf. *Gomillion* v. *Lightfoot*, 1960, 364 U. S. 339, 81 S. Ct. 125, 5 L. Ed. 2d 110. We think it follows that the court has jurisdiction over a

denial of First Amendment rights by the state, and that the federal rights asserted here are not so insubstantial as to warrant our refusing jurisdiction. The motion of the state to dismiss will be overruled and an order may be presented accordingly.

The defendants also have motions pending to strike the plaintiffs King and Keyes on the ground that they do not have such a direct interest in the litigation as would give them standing. They base their standing on an absence of representation in the House because Mr. Bond was deprived of his seat. The Governor has called an election for February 23, 1966 to fill the vacant seat.[1]

It is settled that one seeking to challenge the constitutionality of the statute must show that he has sustained or is in danger of sustaining some immediate direct injury. *Liverpool, N. Y. and P. Steamship Company* v. *Comm. of Emigration,* 1885, 113 U. S. 33, 5 S. Ct. 352, 28 L. Ed. 899; *Commonwealth of Massachusetts* v. *Mellon,* 1923, 262 U. S. 447, 43 S. Ct. 597, 67 L. Ed. 1078. Dr. King and Mrs. Keyes have not ". . . alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues . . ." necessary in determining constitutional questions. *Baker* v. *Carr,* supra.

In a case involving the temporary lack of representation because a United States Senator had been denied his seat pending inquiry into his election and qualifications, *Barry* v. *United States,* 1929, 279 U. S. 597, 49 S. Ct. 452, 73 L. Ed. 867, the court said:

> "The temporary deprivation of equal representation which results from the refusal of the

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[1] Mr. Bond is a candidate for the vacant seat and is the only candidate. The qualifications closed on February 7, 1966. The General Assembly will adjourn its present session on Friday, February 18, 1966. There will be no other regular session of the General Assembly during the year 1966.

> Senate to seat a member pending inquiry as to his election or qualifications is the necessary consequence of the exercise of a constitutional power, and no more deprives the State of its 'equal suffrage' in the constitutional sense than would a vote of the Senate vacating the seat of a sitting member or a vote of expulsion."

We are of the opinion that plaintiffs King and Keyes do not have such a direct interest in the litigation as would give them standing to bring the complaint. This is particularly so in view of the fact that the complaint of Mr. Bond alone will resolve every conceivable issue. Moreover, Dr. King is not a registered voter in the House District in question. The motion of the state to dismiss as to these two plaintiffs will be granted and an order may be presented accordingly.

THE MERITS

The contention that Mr. Bond was denied his seat because of his race was resolved adversely to him from the bench during the hearing of this matter. To support this contention it was urged that Mr. Bond was a Negro; that SNCC was a militant civil rights organization; and that the question of race was inextricably related to each and every statement forming the basis of the challenge. This logic would create license in the name of race. Furthermore, seven Negroes, as stated, were seated on the same day as representatives. Two served on the special challenge committee at the request of Mr. Bond; two Negro senators appeared before the committee as character witnesses for him; and two of the Negro representatives spoke on the floor of the House for him before the final vote. The charge of racial discrimination and thus of denial of equal protection of the law is without foundation in fact.

This ruling also disposes of any claim that Mr. Bond or the citizens and voters of House District No. 136 have been deprived of any right as Negroes under the equal protection clause of the Fourteenth Amendment or under the Fifteenth Amendment. For the reasons stated on the standing question we reject also the contention that the action of the House denied them a republican form of government. This is not even a justiciable issue *Baker* v. *Carr,* supra.

The substantial issue in the case rests on the guaranty of freedom of speech or to dissent under the First Amendment as that amendment has long been applicable to the states under the due process clause of the Fourteenth Amendment. *Gitlow* v. *New York,* 1925, 268 U. S. 652, 45 S. Ct. 625, 69 L. Ed. 1138; *De Jonge* v. *Oregon,* 1937, 299 U. S. 353, 57 S. Ct. 255, 81 L. Ed. 278. But the inquiry does not end simply on the question of deprivation of First Amendment rights *per se.* Rather the inquiry must be in the context of two fundamental principles of government: separation of powers and state government under our system of federalism. The right of free speech would not long exist absent a government founded on these principles.

James Madison writing in Federalist No. 47 said with respect to the separation of powers doctrine:

> "The accumulation of all powers, legislative, executive, and judiciary in the same hands, whether of one, a few or many, and whether heredity, self-appointed, or elective, may justly be pronounced the very definition of tyranny.

And from the beginning states have claimed and enjoyed the protection of the separation of powers principle as between their respective branches of government. This, to date, has been a part of our federalism.

Georgia adopted the separation of powers principle in its first Constitution. Art. I, Const. of 1777. McElreath,

Constitution of Ga., § 239, p. 229. The Constitution of 1789, Art. I, § XIII, McElreath, supra, § 314, p. 243, provided that each House of the state legislature would be the judge of the elections, returns and qualifications of its own members and have the power to expel or punish for disorderly behavior. Similar provisions have been included in every other Georgia Constitution. Ga. Const. of 1798, Art. I, § VIII, McElreath, § 364, p. 253; Const. of 1861, Art. II, § IV, Par. I, McElreath, § 484, p. 286, Const. of 1865, Art. II, § IV, Par. I, McElreath, § 585, p. 304; Const. of 1868, Art. III, § IV, Par. I, McElreath, § 709, p. 328; Const. of 1877, Art. III, § VII, Par. I, McElreath, § 882, p. 361.

> "Each House shall be the judge of the election, returns, and qualifications of its members and shall have power to punish them for disorderly behavior, or misconduct, by censure, fine, imprisonment, or expulsion; but no member shall be expelled, except by a vote of two-thirds of the House to which he belongs."

This language is to be compared with Art. I, § 5, Clauses I and 2 of the Constitution of the United States:

> "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, . . ." (Clause 1)
>
> "Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member." (Clause 2)

The Georgia courts have consistently refused to take jurisdiction over controversies having to do with the qualifications of legislators. The Senate or House, as happened to be the case, was deemed to have exclusive jurisdiction under the Georgia Constitution. *Rainey* v. *Taylor*, 1928, 166 Ga. 476, 143 S. E. 383; *Fowler* v. *Bostick*, 1959, 99 Ga. App.

428, 108 S. E. 2d 720; and *Beatty* v. *Myrick*, 1963, 218 Ga. 629, 129 S. E. 2d 764. This is the general law in this country. Indeed we believe that there is no case to the contrary, federal or state.

Plaintiff recognizes the separation of powers principle as such on both the federal and state levels. He argues however that it exists on the state level only insofar as it does not conflict with the Federal Constitution and must therefore give way to First Amendment rights in view of the vertical application of those rights to the states through the due process clause of the Fourteenth Amendment. This is a correct statement of the law subject to whatever rights were left by the Fourteenth Amendment to the state legislative branches for control of their internal affairs under our system of federalism. We thus must measure Mr. Bond's freedom to speak in this frame of reference.

Before attempting to resolve this new and substantial constitutional question we must concern ourselves with the threshold question, not asserted by plaintiffs, of whether the legislature had the power under the state Constitution or laws to bar Mr. Bond. Our distinguished and able Chief Judge is of the firm view that no such power existed. He seems to find the power of expulsion, but limits the power of judging qualifications to those expressed in the Georgia Constitution. We believe this to be a restrictive view, unfounded in recognized authority and not in keeping with our history or the principle of separation of powers.

Judge Story gave the reasons for vesting exclusive jurisdiction in the legislative branch in such cases (Story, Comm. on the Const., Vol. II, § 831, p. 294):

> "It is obvious, that a power must be lodged somewhere to judge of the elections, returns, and qualifications of the members of each house composing the legislature; for otherwise there could be no certainty, as to who were legitimately chosen

members, and any intruder, or usurper, might claim a seat, and thus trample upon the rights, and privileges, and liberties of the people. Indeed, elections would become, under such circumstances, a mere mockery; and legislation the exercise of sovereignty by any self-constituted body. The only possible question on such a subject is, as to the body, in which such a power shall be lodged. If lodged in any other, than the legislative body itself, its independence, its purity, and even its existence and action may be destroyed, or put into imminent danger. No other body, but itself, can have the same motives to preserve and perpetuate these attributes; no other body can be so perpetually watchful to guard its own rights and privileges from infringement, to purify and vindicate its own character, and to preserve the rights, and sustain the free choice of its constituents. Accordingly, the power has always been lodged in the legislative body by the uniform practice of England and America."

The Supreme Court in *Re Chapman,* 1897, 166 U. S. 661, 17 S. Ct. 677, 41 L. Ed. 1154, a case involving a senate investigation of the conduct of some of its members, said:

"Under the Constitution the Senate of the United States has the power to try impeachments; to judge of the elections, returns, and qualifications of its own members; to determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two thirds, expel a member; and it necessarily possesses the inherent power of self-protection."

We believe a state legislative body necessarily possesses this same inherent power of self-protection if the separation of powers doctrine is to have any real meaning on the state level. And self-protection goes to the process of qualifications as well as expulsion.

In *Hiss* v. *Bartett*, 1855, 3 Gray 468, 63 Am. Dec. 768, the question concerned the legislative power to expel a member. The Massachusetts Constitution contained no such power but did contain the power to judge returns, elections and qualifications. The court said:

> "The authority to be 'judge of the returns, elections, and qualifications of its own members', does not limit their power; they are judges in other respects, in all respects."

Art. I, § 5, of the United States Constitution, as noted, provides that each House shall be the judge of the elections, returns and qualifications of its own members. Art. I, § 3 provides that no person shall be a representative unless he meets certain age, citizenship and residential requirements. In the Constitutional Convention there was an attempt to set up affirmative qualifications. During the debate on that draft which was later rejected, Mr. Dickinson of Delaware, opposed the formulation because it would be held to be exclusive. He stated that he was "against any recitals of qualifications in the Constitution. It was impossible to make a complete one, and a partial one would, by implication, tie up the hands of the Legislature from supplying omissions." Mr. Wilson of Pennsylvania took the same view, saying: "Besides a partial enumeration of cases will disable the Legislature from disqualifying odious and dangerous characters." (Proceedings in Congressional Record, 80th Congress, First Session, January 3, 1947, Vol. 93, p. 12, Senate debate on whether Senator Bilbo of Mississippi was disqualified.)

By way of a historical precedent, Mr. Bilbo was denied his seat in the United States Senate because, among other reasons, his views regarding the right of Negroes to vote were repugnant to the oath he would be required to take. The Senate did not believe that it was limited to the qualifications expressed in the Constitution.

See Willoughby, The Constitutional Law of the United States, 2nd ed., Vol. I, p. 610, where after discussing in § 340 the subject of qualifications for membership being determined by Congress, the author states:

> "The instances that have been cited make it sufficiently clear that the Senate and House have repeatedly held it to be proper that they should consider whether or not persons should be admitted as Senators or Representatives even though possessing all of the qualifications prescribed by the Constitution for membership and bringing credentials in due form of their election."

In the case of Senator Reed Smoot of Utah who had been seated but whose qualifications to continue as a Senator were questioned, the investigation committee recommended that he be expelled either for reason of his membership in a church that countenanced and encouraged polygamy and united church and state contrary to the spirit of the Constitution, or because he had taken an oath of such a nature and character that he is disqualified from taking the oath of office required of a United States Senator. The question was raised concerning the ability of the Senate to add qualifications other than those enumerated in the Constitution and was answered in the report as follows:

> "If his conduct has been such as to be prejudicial to the welfare of society, of the nation, or its Government, he is regarded as being unfit to perform

the important and confidential duties of a Senator, and may be deprived of a seat in the Senate, although he may have done no act of which a court could take cognizance." 1 Hind's Precedents, §§ 481-483.

This situation is analogous to the Georgia Constitution. There is nothing in it which limits qualifications of a legislator to those expressed therein. In point of fact there is at least one disqualification in the Georgia law which is not contained in the Constitution. Ga. Code, § 89-101, § 5, provides:

> "The following persons are held and deemed ineligible to hold any civil office, and the existence of any of the following states of facts shall be a sufficient reason for vacating any office held by such person, but the acts of such person, while holding a commission, shall be valid as the acts of an officer *de facto, viz.*:
>
> • • •
>
> "Persons of unsound mind, and those who, from advanced age or bodily infirmity, are unfit to discharge the duties of the office to which they are chosen or appointed."

The qualifications and disqualifications of legislators in the Georgia Constitution are not all inclusive. In sum, we find nothing that would compel the House to seat a member if a reasonable basis, within the context of due process of law as we shall next discuss, exists for the denial.

Having assumed jurisdiction, we come then to the main question of whether Mr. Bond was improperly denied his seat, but this question is prefaced by the test to be applied. With respect to the test, we hold that the free speech issue should be resolved in the context of giving effect to the

separation of powers principle, and also our system of federalism to the extent that it permits self-government to the states under the supremacy of the Federal Constitution.

There is some authority for such an approach. On the federal level we have some guidance in the case of *Barry* v. *United States,* 1929, 279 U. S. 597, 49 S. Ct. 452, 73 L. Ed. 867. That case arose out of the refusal to seat Senator Vare because of alleged corruption in his election. The issue was over whether the District Court could grant relief to a witness who had been arrested by the Senate because he refused to testify at the subsequent inquiry. The Supreme Court pointed out that the Senate was acting within its constitutional powers which were judicial in character and refused relief. It was said:

> "Here the question under consideration concerns the exercise by the Senate of an indubitable power; and if judicial interference can be successfully invoked it can only be upon a clear showing of such arbitrary and improvident use of the power as will constitute a denial of due process of law. That condition we are unable to find in the present case."

On the State level, with respect to state elections and thus giving effect to federalism but in no way involving the separation of powers principle, we begin with *Wilson* v. *North Carolina,* 1898, 169 U. S 586, 18 S. Ct. 435, 42 L. Ed. 865. There the governor suspended a railroad commissioner and refused him a hearing. The Supreme Court refused relief. In *Snowden* v. *Hughes,* 1944, 321 U. S. 1, 64 S. Ct. 397, 88 L. Ed. 497, a candidate for the state senate alleged that the State Primary Canvassing Board denied him his rights under the equal protection clause by a willful, malicious and arbitrary refusal through a conspiracy to correctly certify the results of a primary election thereby eliminating him as a candidate. He brought his suit in the District Court under the Civil Rights Act of 1871. The

Supreme Court refused relief on the ground that his case did not rise to the level of invidious, purposeful discrimination cognizable under the equal protection clause of the Fourteenth Amendment. The applicable rule of the case is to be found in the dissenting opinion of Mr. Justice Douglas, as follows:

> "My disagreement with the majority of the Court is on a narrow ground. I agree that the equal protection clause of the Fourteenth Amendment should not be distorted to make the federal courts the supervisor of the state elections. That would place the federal judiciary in a position 'to supervise and review the political administration of a state government by its own officials and through its own courts' (Wilson v. North Carolina, 169 U. S. 586, 596, 42 L. ed. 865, 871, 18 S. Ct. 435) — matters on which each State has the final say. I also agree that a candidate for public office is not denied the equal protection of the law in the constitutional sense merely because he is the victim of unlawful administration of a state election law. I believe, as the opinion of the Court indicates, that a denial of equal protection of the laws requires an invidious, purposeful discrimination. But I depart from the majority when it denies Snowden the opportunity of showing that he was in fact the victim of such discriminatory action. His complaint seems to me to be adequate to raise the issue. He chagers a conspiracy to willfully, maliciously and arbitrarily refuse to designate him as one of the nominees of the Republican party, that such action was an 'unequal' administration of the Illinois law and a denial to him of the equal protection of the laws, and that the conspiracy had that purpose . . ."

Snowden v. *Hughes*, as well as *Baker* v. *Carr*, *supra*, at least teach that there must be a showing of invidious,

purposeful discrimination to give rise to relief under the equal protection clause. Here we have the due process clause and First Amendment rights. We think these cases show that some restraint is to be practiced by the courts in considering state political questions concerning particular offices as distinguished from whole systems such as are prevalent in malapportionment, or racial discrimination. If this premise be correct, then there is room for a balance between the separation of powers principle, a system of federalism and individual rights afforded under the federal Constitution.

Being of this view, we conclude that a reasonable test under circumstances such as are presented in this case would be to assume jurisdiction for the purpose of determining whether Mr. Bond was denied due process of law, either procedural or substantive. Notice, an opportunity to be heard, to be represented by counsel, to testify and to offer evidence and to cross-examine adverse witnesses are envisioned in procedural due process. The transcript of the hearing which was held on the challenge to Mr. Bond demonstrates no absence of due process. It is true that there was no subpoena power but no request for an absent witness was made. We reject the contention that procedural or substantive due process was violated by allowing the challengers to vote. A holding to the contrary would do violence to the power to judge qualifications.

As to substantive due process, we conclude that there must be a rational evidentiary basis for the ruling of the House to deny Mr. Bond his seat. The act must not have been arbitrary.

Does the action rest on any evidence which would support the denial? *Thompson* v. *Louisville*, 1960, 362 U. S. 199, 80 S. Ct. 624, 4 L. Ed. 2d 654; *Garner* v. *Louisiana*, 1961, 368 U. S. 157, 82 S. Ct. 248, 7 L. Ed. 2d 207.

Mr. Bond's right to speak and to dissent as a private citizen is subject to the limitation that he sought to as-

sume membership in the House. As such he was required to take an oath to support the Constitution of the United States. This is a legitimate requirement. Indeed, the Federal Constitution requires it. Art. VI, § 3. One of the charges against him was that his statements were inconsistent with and repugnant to that oath. Was there any basis for this charge?

The SNCC statement is at war with the national policy of this country: To make certain that every citizen stands equal before the law; to make certain that every citizen has a fair chance to benefit in the freedom and opportunities and bounties of this country; to export these same principles of democracy to the balance of the world wherever and whenever possible, even to the extent of lending military assistance where self-determination is denied in order that those denied may choose freedom if they so desire. A citizen would not violate his oath by objecting to or criticizing this policy or even by calling it deceptive and false as the statement did.

But the statement does not stop with this. It is a call to action based on race; a call alien to the concept of the pluralistic society which makes this nation. It aligns the organization with "... colored people in such other countries as the Dominican Republic, the Congo, South Africa, Rhodesia ..." It refers to its involvement in the black people's struggle for liberation and self-determination ...". It states that "Vietnamese are murdered because the United States is pursuing an aggressive policy in violation of international law." It alleges that Negroes, referring to American servicemen, are called on to stifle the liberation of Viet Nam.

The call to action, and this is what we find to be a rational basis for the decision which denied Mr. Bond his seat, is that language which states that SNCC supports those men in this country who are unwilling to respond to a military draft. The fact that the last paragraph calls on

them to devote their energies to the alternative of working in the civil rights movement in no way avoids the fact that the organization offers support to men who are unwilling to respond to a military draft. Cf. *Gara* v. *United States*, 6 Cir., 1949, 178 F. 2d 38.

Mr. Bond was careful to affirm this statement. He went further, and he was more than a private citizen; he was an officer and employee of SNCC and was about to become a member of the House of Representatives of Georgia. He stated that he admired the courage of anyone who burned his draft card. He stated that as a pacifist he was eager and anxious to encourage people not to participate in the war in Viet Nam or in any other war for any reason that they choose, and lastly, he stated that, as a second class citizen, he did not think that he had the requirement to support the war in Viet Nam.

The Congress has the obligation under the Federal Constitution for providing for the common defense of this nation. The Selective Service System is a part of that defense. We are committed in Viet Nam. The Congress approved this course in Public Law 88-408, August 10, 1964, wherein the president was empowered to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression from the campaign being waged by the "... Communist regime in North Vietnam." This resolution states that the United States "... regards as vital to its national interest and to world peace the maintenance of international peace and security in Southeast Asia."

Whether Mr. Bond should have been seated was a question which presented itself to the House of Representatives of Georgia under our system. Whether the wisest course was followed is not for us to say. The judgment of the court is not to be substituted for that of the House. Our function is to determine whether he has been denied some

fundamental federal right to which he was otherwise entitled. We find and hold that his statements and affirmation of the SNCC statement as they bore on the functioning of the Selective Service System could reasonably be said to be inconsistent with and repugnant to the oath which he was required to take. This suffices as a rational basis for the action of the House. The fact that the statement was otherwise freighted with racial overtones and was at variance with the established national concept of a country accommodating all nationalities and ethnic groups is a part of the basis of our holding only insofar as it relates to the call not to support the Selective Service System.

The charge that the constitutional provision of Georgia authorizing the House to judge the qualifications of its members and the House rule embodying it are unconstitutionally vague is without merit. It follows from what we have said that neither was unconstitutionally applied to Mr. Bond. It also follows from what we have said that the resolution denying Mr. Bond his seat was not an *ex post facto* law or a bill of attainder. To so hold in the face of a finding that there was a rational basis for the action of the House would be to destroy the constitutional power of judging qualifications.

All relief is denied and the complaint will be dismissed. Defendants may present a judgment accordingly.

This 10 day of February, 1966.

GRIFFIN B. BELL
Griffin B. Bell
United States Circuit Judge

LEWIS R. MORGAN
Lewis R. Morgan
United States District Judge

Judge ELBERT P. TUTTLE dissenting.

TUTTLE, Circuit Judge:

With deference I must dissent. I am convinced that Representative-elect Bond was illegally deprived of his seat in the House of Representatives of Georgia and that this court should so hold.

Julian Bond, the plaintiff in this action, was duly elected by the voters of his General Assembly District No. 136 as their representative in the House of Representatives of the Georgia General Assembly for the session commencing January 1, 1966. This is a one-year session, made necessary by this Court's previous decision requiring a reapportionment of the Georgia State Legislature.

Upon his presenting himself along with the other newly elected members of the House of Representatives, he was asked to step aside because challenges to his qualifications had been filed by some 75 members of the House. After the other members had been duly sworn in, a resolution protesting the seating of Representative-elect Bond was referred by the Speaker of the House to a special committee designated to hear the contest. The committee, after a hearing, recommended that he be not seated. This recommendation was accepted by the House, and he was denied his seat.

Since the first attack that is made is based upon the contention that the House exceeded its authority in voting to reject Bond, we turn first to a consideration of the provisions of the Georgia Constitution dealing with the qualifications and eligibility of members.

Article III, Section VII, Paragraph I, of the Georgia Constitution (§ 2-1901, Ga. Code Ann.) provides as follows:

> "Election, returns, etc.; disorderly conduct.—East House shall be the judge of the election, returns, and qualifications of its members and shall have power to punish them for disorderly behavior, or misconduct, by censure, fine, imprisonment, or expul-

sion, but no member shall be expelled, except by a vote of two-thirds of the House to which he belongs."

Article III, Section VI, Paragraph I, of the Constitution of the State of Georgia (§ 2-1801, Ga. Code Ann.) provides as follows:

"Qualifications of representatives.—The Representatives shall be citizens of the United States who have attained the age of twenty-one years, and who shall have been citizens of this State for two years, and for one year residents of the counties from which elected."

Article II, Section II, Paragraph I, of the Constitution of the State of Georgia (§ 2-801, Ga. Code Ann.) provides as follows:

"Registration of electors; who disfranchised.—The General Assembly may provide, from time to time, for the registration of all electors, but the following classes of persons shall not be permitted to register, vote, or hold any office, or appointment of honor, or trust in this State, to-wit: 1st. Those who shall have been convicted in any court of competent jurisdiction of treason against the State, of embezzlement of public funds, malfeasance in office, bribery or larceny, or of any crime involving moral turpitude, punishable by the laws of this State with imprisonment in the penitentiary, unless such persons shall have been pardoned. 2nd. Idiots and insane persons."

Article III, Section IV, Paragraph VI, of the Georgia Constitution (§ 2-1606, Ga. Code Ann.) provides as follows:

"Eligibility; appointments forbidden.—No person holding a military commission, or other appoint-

ment, or office, having any emolument, or compensation annexed thereto, under this State, or the United States, or either of them except Justices of the Peace and officers of the militia, nor any defaulter for public money, or for any legal taxes required of him shall have a seat in either house; nor shall any Senator, or Representative, after his qualification as such, be elected by the General Assembly, or appointed by the Governor, either with or without the advice and consent of the Senate, to any office or appointment having any emolument annexed thereto, during the time for which he shall have been elected, unless he shall first resign his seat, provided, however, that during the term for which he was elected no Senator or Representative shall be appointed to any civil office which has been created during such term."

Article VII, Section III, Paragraph VI, of the Constitution of the State of Georgia (§ 2-5606, Ga. Code Ann.) provides as follows:

"Profit on public money.—The receiving, directly or indirectly, by any officer of State or county, or member or officer of the General Assembly of any interest, profits or perquisites, arising from the use or loan of public funds in his hands or moneys to be raised through his agency for State or county purposes, shall be deemed a felony, and punishable as may be prescribed by law, a part of which punishment shall be a disqualification from holding office."

Article III, Section IV, Paragraph V, of the Georgia Constitution (§ 2-1605, Ga. Code Ann.) provides as follows:

"Oath of members.—Each senator and Representative, before taking his seat, shall take the following oath, or affirmation, to-wit: 'I will support

the Constitution of this State and of the United States, and on all questions and measures which may come before me, I will so conduct myself, as will, in my judgment, be most conducive to the interests and prosperity of this State.'"

The foregoing provisions of the Georgia Constitution are the only stated qualifications or rules of eligibility contained in the State Constitution touching on the membership in either the Senate or the House of Representatives of the Georgia General Assembly.

Julian Bond was denied the right to take his oath as an elected member of the Georgia House of Representatives by a resolution adopted by the said House on January 10, 1966, which said resolution was in the following language:

"Relative to the matter of the seating of Representative-Elect Julian Bond; and for other purposes.

"WHEREAS, a special committee created pursuant to H.R. No. 7 which was appointed for the purpose of holding a hearing on petitions challenging and contesting the seating of Representative-Elect Julian Bond of the 136th District has conducted a hearing in said matter; and

"WHEREAS, said committee has submitted a report in which it is recommended that Representative-Elect Julian Bond not be allowed to take the oath of office as a Representative of the House of Representatives and that he not be seated as a member of the House of Representatives.

"NOW, THEREFORE, BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES that the report of the aforesaid committee is hereby adopted and the recommendations contained therein shall be followed.

"BE IT FURTHER RESOLVED that Representative-Elect Julian Bond shall not be allowed to take the oath of office as a member of the House of Representatives and that Representative-Elect Julian Bond shall not be seated as a member of the House of Representatives.

"BE IT FURTHER RESOLVED that the Clerk of the House is hereby instructed to immediately transmit a copy of the aforesaid report and a copy of this resolution to the Governor, to the Secretary of State and to Representative-Elect Julian Bond."

The said resolution expressly "adopted" the report of the special committee which was appointed for the purpose of conducting, and did actually conduct, a hearing on the matter of the challenge to the seating of Representative-Elect Bond. The report of the committee follows:

"The Special Committee appointed pursuant to H.R. #7 conducted a hearing on January 10, 1966, beginning at 2:30 o'clock p.m., in the chamber of the House of Representatives, State Capitol, on the matter of petitions filed challenging and contesting the seating of Representative-Elect Julian Bond of the 136th District.

"Based upon testimony and the evidence and documents before this Committee, the Committee recommends that Representative-Elect Julian Bond not be allowed to take the oath of office as a member of the House of Representatives and that he not be seated as a member of the House of Representatives.

"This 10th day of January 1966."

The contest which was thus submitted to the special committee, and thereafter decided by the House, resulted

from charges and specifications filed by certain members of the House of Representatives in two separate petitions which, in essential part, are as follows:

PETITION I

"COUNT I

"The Student Nonviolent Coordinating Committee, an organization and association of which Representative-Elect Julian Bond is a member, agent, and publicity director, has caused to be made certain statements concerning the position of the United States in the Viet Nam conflict, a copy thereof being attached hereto, marked Exhibit A and by reference made a part hereof, and the said Representative-Elect Julian Bond did publicly endorse, approve and confirm said statement.

"COUNT II

"Said representative-elect has said that he admires the courage of those persons who burn their draft cards.

1.

"The actions and statements of said representative-elect show that he does not and will not support the Constitution of the United States and of the State of Georgia, as required by law (Constitution of Georgia, Article III, Section IV, Paragraph V (Code § 2-1605)); Constitution of the United States, Article VI, Section 3.

2.

"By said actions and statements, said representative-elect adheres to the enemies of the United States and of the State of Georgia, contrary to the Constitution of Georgia (Article I, Section II, Para-

graph II) and of the United States (Article III, Section 3, Cl. 1).

3.

"By said actions and statements, said representative-elect gives aid and comfort to the enemies of the United States and of the State of Georgia, contrary to the Constitution of Georgia (Article I, Section II, Paragraph II) and of the United States (Article III, Section 3, Cl. 1).

4.

"Said actions and statements constitute a violation of the United States Code, Title 50, § 462(a).

5.

"Said actions and statements constitute a violation of the United States Code, Title 50, § 462(b), as amended.

6.

"The statements referred to above are reprehensible and are such as tend to bring discredit to and disrespect of the House of Representatives and constitute actions on the part of Representative-Elect Julian Bond sufficient to prevent him from being seated as a member of the House of Representatives.

7.

"Such actions and statements show that he is unqualified and ineligible to be a member of the House of Representatives."

EXHIBIT A TO PETITION I

"The Student Nonviolent Coordinating Committee has a right and a responsibility to dissent with

United States foreign policy on an issue when it sees fit. The Student Nonviolent Coordinating Committee now states its opposition to United States' involvement in Viet Nam on these grounds:

"We believe the United States government has been deceptive in its claims of concern for freedom of the Vietnamese people, just as the government has been deceptive in claiming concern for the freedom of colored people in such other countries as the Dominican Republic, the Congo, South Africa, Rhodesia and in the United States itself.

"We, the Student Nonviolent Coordinating Committee, have been involved in the black people's struggle for liberation and self-determination in this country for the past five years. Our work, particularly in the South, has taught us that the United States government has never guaranteed the freedom of oppressed citizens, and is not yet truly determined to end the rule of terror and oppression within its own borders.

"We ourselves have often been victims of violence and confinement executed by United States government officials. We recall the numerous persons who have been murdered in the South because of their efforts to secure their civil and human rights, and whose murderers have been allowed to escape penalty for their crimes.

"The murder of Samuel Young in Tuskegee, Ala., is no different than the murder of peasants in Viet Nam, for both Young and the Vietnamese sought, and are seeking, to secure the rights guaranteed them by law. In each case the United States government bears a great part of the responsibility for these deaths.

"Samuel Young was murdered because United States law is not being enforced. Vietnamese are

murdered because the United States is pursuing an aggressive policy in violation of international law. The United States is no respecter of persons or law when such persons or laws run counter to its needs and desires.

"We recall the indifference, suspicion and outright hostility with which our reports of violence have been met in the past by government officials.

"We know that for the most part, elections in this country, in the North as well as the South, are not free. We have seen that the 1965 Voting Rights Act and the 1964 Civil Rights Act have not yet been implemented with full federal power and sincerity.

"We question, then, the ability and even the desire of the United States government to guarantee free elections abroad. We maintain that our country's cry of 'preserve freedom in the world' is a hypocritical mask behind which it squashes liberation movements which are not bound, and refuse to be bound, by the expediencies of United States cold war policies.

"We are in sympathy with, and support, the men in this country who are unwilling to respond to a military draft which would compel them to contribute their lives to United States aggression in Viet Nam in the name of the 'freedom' we find so false in this country.

"We recoil with horror at the inconsistency of a supposedly 'free' society where responsibility to freedom is equated with the responsibility to lend oneself to military aggression. We take note of the fact that 16 percent of the draftees from this country are Negroes called on to stifle the liberation of Viet Nam, to preserve a 'democracy' which does not exist for them at home.

"We ask, where is the draft for the freedom fight in the United States?

"We therefore encourage those Americans who prefer to use their energy in building democratic forms within this country. We believe that work in the civil rights movement and with other human relations organizations is a valid alternative to the draft. We urge all Americans to seek this alternative, knowing full well that it may cost them lives—as painfully as in Viet Nam."

PETITION II

"(1) That the Constitution of Georgia, Article III, Section VII, Paragraph 1 provides that each House shall be the judge of the election, returns, and qualifications of its members.

"(2) That the Constitution of Georgia, Article III, Section IV, Paragraph 5, specifically requires each senator and representative, before taking their seat, to take the following oath or affirmation, to-wit:

> 'I will support the Constitution of this State and of the United States, and on all questions and measures which may come before me, I will so conduct myself, as will, in my judgment, be most conducive to the interest and prosperity of this State.'

"That the said Julian Bond has specifically and publicly endorsed in full a policy statement of an organization known as the Student Non-Violent Coordinating Committee, which statement reads as follows:

> 'We are in sympathy with, and support, the men in this country who are unwilling to respond to a military draft which would compel them to contribute their lives to United States aggression

in Viet Nam in the name of the "freedom" we find so false in this country.'

'We recoil with horror at the inconsistency of a supposedly free society where responsibility to freedom is equated with the responsibility to lend oneself to military aggression. We take note of the fact that 16 per cent of the draftees from this country are Negroes called on to stifle the liberation of Viet Nam, to preserve a "democracy" which does not exist for them at home . . .'

'We, therefore, encourage those Americans who prefer to use their energy in building democratic forms within this country. We believe that work in the civil rights movement and with other human relations organizations is a valid alternative to the draft. We urge all Americans to seek this alternative, knowing full well that it may cost them their lives—as painfully as in Viet Nam.'

"(4) That the said Julian Bond is not qualified under the Constitution of Georgia to take the oath as a Member of the House of Representatives representing the 136th Representative District of Fulton County, Georgia, inasmuch as his full endorsement of the aforesaid policy statement of the Student Non-Violent Coordinating Committee is totally and completely repugnant to and inconsistent with the mandatory oath prescribed by the Constitution of Georgia for a Member of the House of Representatives to take before taking his seat.

"(5) That the said Julian Bond cannot justly and honestly take the aforementioned mandatory constitutional oath which requires him to uphold the Constitution of the United States and the Constitu-

tion of Georgia, having endorsed the aforesaid subversive policy statement."

At the Committee hearing, the proponents of the contest sought to substantiate their claim by having played into the record a taped newscaster's interview with Mr. Bond which, although not made by him as a public statement upon his own initiative in the normal manner of making a hortatory expression, was made, it may be assumed, with the knowledge that it would be broadcast by the newscaster. The Committee also invited from Mr. Bond his comment. He stated to the Committee that he "did support" the statement of the SNCC, quoted above, in its entirety.

In support of the charge that Bond had "said that he admires the courage of those persons who burn their draft cards", the following question was asked: "Do you admire the courage of persons who burn their draft cards?" after which, the following question and answer occurred:

"A. I admire people who take an action, and I admire people who feel strongly enough about their convictions to take an action like that knowing the consequences that they will face, and that was my original statement when asked that question.

"Q. Do you still adhere to that statement? A. Yes, I do.

"Q. Let me see if I have your statement correct, that you admire people who are willing to take the consequences, to stand up for their principles, is that substantially what you said? A. That is correct.

"Q. And does that admiration of such people go to taking such a stand, when such a stand is in violation of a valid law of the United States? A. I have never suggested or counseled or advocated that anyone other person burn their draft card. In fact, I have mine in my pocket and will produce it if you

wish. I do not advocate that people should break laws. What I simply try to say was that I admired the courage of someone who could act on his convictions knowing that he faces pretty stiff consequences.

"Q. So that you admire the courage of the persons in the given instance who burn their draft cards, or who were willing to take the consequences for burning their draft cards? A. That is right."

In a written response to the charges and during the proceedings Representative Bond stated his willingness and desire to take the oath to support the Constitutions of the United States and the State of Georgia as prescribed by the Georgia Constitution.

It is clear that the refusal to seat this elected representative was upon the charge, adequately proven, of his stated support in an interview with a newsman and subsequently in the corridor of the House of Representatives (after the challenge had been referred to the Committee) of the SNCC statement and his views touching on the draft card matter.

The suit before us challenges the authority of the House of Representatives, under the provision making it "the Judge of the . . . qualifications of its members" to deny an elected member, the right to be seated for any lack of qualifications not specifically prescribed in the Georgia Constitution. Further, the complaint asserts that the actual ground of his rejection as a member was the disapproval by the House of his conduct, to-wit: the expression of the extremely unpopular (characterized as illegal and disloyal by the proponents of the contest) views as above set out; that a denial of his seat because of such conduct constitutes an abridgment by the State of Georgia of Bond's freedom of speech in violation of the guarantee of the First Amendment to the United States Constitution, which guarantee is made effective as against State action by "absorption"

into the guarantee of due process by the Fourteenth Amendment. See Palko v. Connecticut, 302 U. S. 319, 324, 326.

The complaint requires the convening of a three-judge District court under Title 28, Section 2281, United States Code Annotated, because it charges that if Article III, Section VII, Paragraph 1 of the Georgia Constitution, supra (making each House the judge of the qualifications of its members), is construed in the manner in which it was applied in this case, then the said Section of the Georgia Constitution is invalid under the Fourteenth Amendment. Once convened properly, such a court has jurisdiction to decide every question involved in the litigation, state as well as federal. Missouri v. Brashear Freight Lines, 312 U. S. 621; R. R. Comm. of Calif. v. Pacific Gas & Electric Company, 302 U. S. 388.

It is a basic principle of jurisprudence that if, by construction of a statute in a manner that will make it constitutional, this avoids the question whether the statute, differently construed, would be unconstitutional, a court should first construe the statute with an eye to the avoiding of the constitutional question if possible See Rescue Army, et al, v. Municipal Court of Los Angeles, 331 U. S. 549, 568, et seq.

Thus, we look first to determine whether the challenged provision of the Georgia Constitution may properly be construed so as to permit the unseating of Representative-Elect Bond on the grounds stated. Of course, if the Georgia Supreme Court had construed the statute in such a manner this construction of the Georgia Constitution would be binding on us. The Court has not so construed it.

The State of Georgia claims that, at least within the factual context of this contest, the power of the House of Representatives to judge Bond's qualifications is "plenary." It offers, in support of this proposition, three Georgia Court decisions: Rainey v. Taylor, 166 Ga. 476

(1928); Beatty v. Myrick, 218 Ga. 629 (1963); and Fowler v. Bostick, 99 Ga. App. 428 (1959).

In point of fact, in none of these Georgia decisions did the court determine that the House or Senate had absolute and final jurisdiction to judge whether the contesting parties lacked qualifications *which are not expressly stated as "qualifications" or rules of "eligibility" in the Georgia Constitution.*

The Rainey case dealt with a charge by one Taylor, in a *quo warranto* proceeding against Rainey, that Rainey was, at the time of his election to the Georgia General Assembly, an acting superintendent of Schools. It being provided in the Georgia Constitution that the "qualifications of members" is to be decided by the House of Representatives, and, the Constitution in what is now Section 2-1606, quoted supra, providing that the holder of another state office "shall not have a seat in either House," it was a question for the General Assembly to judge whether Rainey was disqualified under a *stated* ground in the constitution. The Court merely held that a rule of "eligibility" was comprehended within the term "qualifications."

In the subsequent case of Beatty v. Myrick, in a headnote opinion, the Supreme Court of Georgia stated that the question was which of two named candidates was legally *elected* to represent the Third Senatorial District in the State Senate. There was thus no question of testing the "qualifications" of the senator-elect. It was simply a matter of judging who was the winner of the election. This question is expressly confided by the Constitution to the State Senate.

Fowler v. Bostick was in all respects similar to the Rainey case. It was an action for a declaratory judgment seeking to disqualify Bostick as ineligible to be seated as Representative of Tift County because he was, at the time, alleged to hold the office of Clerk of the Superior Court of Tift County. Here, as in Rainey, the court was asked

to determine whether an elected member met the *qualifications expressly stated* in the Georgia Constitution. Of course, no criticism can be made of such a decision as these three by the Georgia courts. The question, not before the Court there, is whether, under the Georgia Constitution, the Legislature can find a lack of qualifications beyond those *expressly provided* for in the Constitution itself and as set out above.

In the absence of a strong showing of judicial interpretation to the contrary, it would seem that simple justice would require a holding that where specific qualifications are stated for an office and the Legislature is given the power to judge whether an aspirant for the office is "qualified", the legislature, as judge, should be required to look to the stated qualifications as the measuring stick. To hold to the contrary and permit the House as judge to go at large in a determination of whether Representative-Elect "A" meets undefined, unknown and even constitutionally questionable standards shocks not only the judicial, but also the lay sense of justice.

It can be readily understood why there are few legal precedents to give guidance in such a situation. In the first place, it can be assumed that members of a state or national legislature are prone to recognize the right of the electorate to choose as their representative whom they want to serve them. Thus, there may not be expected to be many clear precedents. Further it is readily apparent that in those cases in which a legislative body has exceeded its authority the shortness of the term of office may make moot any contest in court.

Nevertheless, there are some legislative precedents. In a New York state general election held on November 4, 1919, five members of the Socialist party were elected as members of the General Assembly of the State of New York. They appeared and took the oath of office, and thereupon, as soon as the House was organized, a motion

was made to deprive them of their rights to participate, or, in other words, to expel them from membership in the House. A resolution for such expulsion was submitted and referred to a committee which conducted hearings resulting in a resolution to expel, and the members were later, by action of the Legislature, expelled from membership.

During the pendency of the hearings, the annual meeting of the Association of the Bar of the City of New York adopted a resolution authorizing appointment of a committee "to appear before the Assembly or its Judiciary Committee and take such action as may in their judgment be necessary to safeguard and protect the principles of representative government guaranteed by the Constitution, which are involved in the proceedings now pending."

This Committee, under the Chairmanship of Honorable Charles E. Hughes, a former Governor of the state of New York and a former member of the United States Supreme Court who resigned to be a candidate for the presidency of the United States in the elections in 1916, and who later was reappointed to the Supreme Court of the United States and became Chief Justice, and including in its membership Honorable Joseph M. Proskauer, later an eminent New York Supreme Court Justice, and Honorable Ogden L. Mills, who later became Secretary of the Treasury of the United States (the other members, Honorable Morgan J. O'Brien and Honorable Louis Marshall, all doubtless men of similar public spirit and competence, but their names do not at the moment call to mind the character of their other public service) filed a careful brief, because, as the Committee said, they regarded "these proceedings as inimical to our institutions, because they tend to subvert the very foundation upon which they rest—representative government." In the course of the discussion of the situation then pending, the Committee made it plain that the action was an action

for expulsion rather than an action to determine the qualifications of the members under the provisions of the New York Constitution similar to that of the State of Georgia. In pointing to the reason why they considered the proceedings not a testing of "the qualifications" of the members, they cited from the proceedings of the United States Senate, in which Senator Reed Smoot, of Utah, was the subject of proceedings attacking his membership in the United States Senate on the charge that he was one of the twelve apostles of the Mormon Church, and, therefore, a prominent member of the hierarchy, and, though not a polygamist, sanctioned polygamy, a practice prohibited by the organic act of Congress admitting Utah as a state.

In the course of the Smoot proceedings, Senator Philander C. Knox, a distinguished Senator from the state of Pennsylvania, discussed the question of testing the qualifications of a member of the Senate under the United States Constitutional provisions that are similar to those in Article III, Section V, etc., set out above. His statement is a complete answer to the claim that a legislature may require any qualifications it chooses. Senator Knox said:

> "I have intentionally referred to the proposed action against Senator Smoot as expulsion. I do not think the Senate will seriously consider that any question is involved except one of expulsion, requiring a two-thirds vote.[1] There is no question as to Senator Smoot possessing the qualifications *prescribed by the Constitution* and therefore we cannot deprive him of his seat by a majority vote. *He was, at the time of his election, over 30 years of age and had been nine years a citizen of the United States, and when elected was an inhabitant of Utah. These*

[1] Under the United States Constitution, a majority of the Senate could find a Senator not qualified, whereas it required a two-thirds vote to expel a member. This is similar to the Georgia Constitution.

> *are the only qualifications named in the Constitution, and it is not in our power to say to the States, 'these are not enough; we require other qualifications,' or to say that we cannot trust the judgment of the states in the selection of Senators, and we, therefore, insist upon the right to disapprove them for any reason. This claim of right to disapprove is not even subject to any rule of the Senate specifying additional qualifications of which the states have notice at the time of selecting their senators, but it is said to be absolute in each case as it arises, uncontrolled by any canon or theory whatever . . . Subject to these limitations imposed by the Constitution, the states are left untrammeled in their right to choose their senators''* (Emphasis supplied).

The record discloses that the Senate declined to expel or otherwise deny Senator Smoot his right to sit. However, the five members of the New York State Legislature, whose cause was so eloquently presented by the Hughes Committee, did not fare so well. They were denied their seats.

Expressing their own views again on the question of the power of the Legislature to disqualify a member for grounds other than those stated in the Constitution, the Hughes Committee stated:

> "We contend that the opinion expressed by Senator Knox in the case of Senator Smoot, supra, correctly defines what is meant by qualification. The constitution expressly specifies a number of disqualifications [as is also true in the Georgia Constitution] . . . The principle of constitutional interpretation applicable to this phase of the subject was elaborated in classic phrase by Chancellor Sanford in Barker v. People, 3 Cowen, 703, which, although decided in 1824, and therefore involving the interpretation of an

earlier Constitution, is nevertheless as applicable in principle to the present Constitution: 'Eligibility to public trust, is claimed as a constitutional right, which cannot be abridged or impaired. The Constitution established and defines the right of suffrage; and gives to the electors and to their various authorities, the power to confer public trust. . . . *Excepting particular exclusions thus established, the electors and the appointing authorities are, by the Constitution wholly free to confer public stations upon any person, according to their pleasure. The Constitution* giving the right of election and the right of appointment; these rights consisting essentially in the freedom of choice; and the Constitution also declaring, that certain persons are not eligible to office; it follows from these powers and provisions, that all other persons are eligible. Eligibility to office is not declared as a right or principle, by any expressed terms of the Constitution; but it results, as a just deduction, from the expressed powers and provisions of the system. The basis of the principle, is the *absolute liberty of* electors and the appointing authorities, *to choose* and to appoint *any person, who is not made ineligible by the Constitution* . . . I, therefore, conceive it to be entirely clear that the Legislature cannot establish arbitrary exclusions from office or any general regulation requiring qualifications, which the Constitution has not required.' . . . He would be indeed a bold individual who would assert that any American Legislative body can set up an arbitrary standard of qualification of its members that finds no sanction in the general will of the people and that is contrary to the spirit of the Constitution. . . ." Brief of Special Committee appointed by the Association of the Bar of the City of New York, January 20, 1920 (Emphasis supplied).

Appendix B—Opinions Below

A number of actions of the United States House of Representatives or the United States Senate are cited by the State as illustrative in its argument that the term "qualification," is broad enough to encompass a test of the representative elect's general character and loyalty. Based upon the excerpts from these cases as contained in the State's brief, each of them is to be distinguished.

The first of these cases is that of Victor Berger, a Congressman from Wisconsin, who had served in the House from 1911 to 1913. In 1918, he was again elected to the 66th Congress. Before appearing to be sworn in, he was indicted by the grand jury in the United States District Court for the violation of the Espionage Act. He was found guilty and sentenced to 20 years imprisonment. The appeal was pending at the time he offered to take the oath of office in the United States Congress. The House of Representatives adopted the report of the Committee, which found that "the question was 'whether or not Victor L. Berger was guilty of a violation of the Espionage Act, whether or not he did give aid or comfort to the enemies of the United States during the war with Germany [which, of course, in time of war, would amount to treason under the Constitution of the United States] and whether or not he was ineligible to a seat in the House of Representatives". The Committee found "after a careful consideration of all the evidence, in the opinion of your committee, the admitted acts, writings, and declarations of Victor L. Berger . . . giving such acts in the language of the writings and declarations their ordinary, everyday meaning, and without considering any other evidence, clearly establishes a conscious, deliberate and continuing purpose and intent to obstruct, hinder and embarrass the government of the United States and the prosecution of the war, and thus to give aid and comfort to the enemies of our country. . . ."

The United States Constitution, in describing the crime of treason provides that "the Congress shall have power

to declare the punishment of treason," Article III, Chapter 3, Section 3[2]. Congress has determined that one of the punishments for treason is that "Every person so convicted of treason shall, moreover, be incapable of holding any office under the United States." This was the language of the statute that was in effect at the time of Berger's contest. The present counterpart is found in 18 U. S. C. A., § 2381, in which it says that a person so convicted "shall be incapable of holding any office under the United States."

Thus, although he had been convicted of sedition and not treason, Berger's rejection by the House of Representatives was on a determination by the House that he had committed treason, which, if found by a court would be a lack of qualifications prescribed by the United States Constitution. Although in the committee report, it was argued that the House was not limited to constitutionally defined "qualifications" in passing upon Berger's eligibilty, nevertheless the action of the House in rejecting him falls within the pattern of what is permissible under the principles discussed in the Hughes Committee Report, *supra*. There was no court test of this exclusion.

William Blount, of Tennessee, was *expelled* from the Senate after having been seated. He was expelled "for conduct inconsistent with his public duty, rendering him unworthy of further continuance of his present public trust." This action was taken under the provision of the United States Constitution which authorizes "each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with concurrence of two-thirds, expel a member." Article I, Sec. 5, Clause 2. It has nothing to do with Article I, Section 5, Clause 1, which provides that "each House shall be the judge of the elections, returns and qualifications of its own members. . . ." This is an important distinction because the authority to expel, unlike the provision relating to qualifications, is not limited by any language in the Constitution prescribing the grounds for expulsion.

John Smith, of Ohio, was cited for treason and misdemeanor as an accomplice of Aaron Burr. The Senate voted 19 for expulsion and 10 against. On the resolution failing to secure the necessary two-thirds, Smith retained his seat. Here, again, it was an action of expulsion. It is no precedent for giving "plenary" power to judge qualification.

John M. Niles, of Connecticut, was examined before taking the oath of office as to his mental capacities. The Committee found that he suffered under a mental physical debility, but that he was able to perform his duties, and he was seated. Of course, as noted above, insanity is a qualification by the Georgia Constitution for members of the House and Senate of this State.

John D. Bright, of Indiana, was expelled because it was found that he had written a certain letter to assist a member of the Confederate states to buy firearms. Note again that this was a matter of expulsion for an act of misconduct while a member and not a matter of determining qualification to be seated.

Joshua Hill and H. V. M. Miller, of Georgia, were refused seats in the United States Senate because of the manner in which the Georgia General Assembly, which had elected Hill and Miller, was conducting its elections. (Of course, this was at a time prior to the adoption of the 17th Amendment, and senators were elected by the State Legislatures.) This, of course, went directly to the question of judging "the election," which is expressly authorized by the United States and Georgia Constitutions. The Reed Smoot case has been discussed previously. It was again, a question of expelling a senator and not one of passing on his qualifications at the time he presented himself.

The most recent case involved Senator Theodore G. Bilbo, who was not administered the oath pending an investigation of charges that his action's dealing with racial policies were said to be "contrary to the public policy,

harmful to the dignity and honor of the Senate, dangerous to the perpetuity of free government, and taint [sic] with fraud and corruption of the credentials."

If a substantial part of the charge was the question of fraud and corruption of the credentials, this, of course, would be a matter of judging "the election," which is specifically authorized. In any event, Senator Bilbo was forced to step aside for an operation and he died before action was taken on his seating.

In 1926, William S. Vare, of Pennsylvania, and Frank L. Smith, of Illinois, were refused seats for excessive expenditures during their respective election campaigns. Once again this was a question of judging "the election," authority for which is expressly given to the Senate.

If there are other cases involving action by the United States Congress in which it is expressly shown that it has assumed the right to expand the list of qualifications beyond those stated in the United States Constitution, they have not been brought to our attention.

It is quite difficult to ascertain from available materials, which, if any, state cases cited in the briefs of the parties were decided on a basis that explicitly shows that a state House or a state Senate has considered that it can determine a prospective member to be not qualified for grounds other than those stated in the respective constitutions as the qualifications or basis of eligibility for the office.

Representative-Elect Bond was not challenged on the ground that he was not 21 years of age; that he had not been a citizen of the State for the requisite two years and a resident of the county from which he was elected. Nor was he challenged on the ground that he had been convicted of treason against the state, embezzlement of public funds, misfeasance in office, bribery or larceny or any crime punishable by the laws of the state, punishable with

imprisonment in the penitentiary. He was not charged with having received any interest, profit or perquisite arising from the use or loan of public funds. He offered to take the prescribed oath of office.

Since it cannot be claimed that he was found disqualified on some ground other than those of which he was charged, as this would be the clearest sort of deprivation of due process guaranteed not only by the United States Constitution, but also by the Georgia Constitution as well, Article I, Section I, Paragraph III, Constitution of the State of Georgia, Section 2-103, Ga. Code Ann., it is clear that Bond was found disqualified on account of conduct not enumerated in the Georgia Constitution as a basis of disqualification. This was beyond the power of the House of Representatives. It runs counter to the express provisions of the Georgia Constitution giving to the people the right to elect their representatives, and limiting the Legislature in its right to reject such elected members to those grounds which are expressly stated in Georgia's basic document.

As pointed out above, no Georgia decision has held that the courts of this state are helpless to intervene where a House of the Legislature undertakes to disqualify a person on a ground not specified. The decisions thus far reach only the proposition that where the Georgia Constitution authorizes the House to pass upon the qualifications of its members, all of the provisions in the Constitution touching on qualifications may be considered by the House in determining whether a member-elect meets the specified standards. In view of my conclusion that the action of the lower house of the General Assembly was in violation of the State Constitution, it would seem that Article I, Section IV, Paragraph II, would come into play. This section provides: "Legislative Acts in violation of this Constitution, or the Constitution of the United States, are void, and the judiciary shall so declare them." Section

2-402, Ga. Code Ann. Since, therefore, a Georgia Court is given the authority to declare such an act void, as in violation of the Georgia Constitution, pendent jurisdiction places this obligation upon this Court.

While it might be argued that, under normal circumstances, if there were nothing before this Court other than the charge that the State Legislature violated the Georgia Constitution, rules of comity might require that this Court refrain from assuming jurisdiction over such a controversy, this is not such a case. If we were to refrain from acting on the State constitutional question, we would then be faced squarely with the necessity of deciding the grave Federal constitutional question. That question is, whether the plaintiff has been deprived of his First Amendment rights by the action of the Georgia House. The gravity of that question cannot be doubted, since it is clear that it was for expression of his views that Bond was denied his seat. In view of the fact that all of plaintiff's rights can be fully adjudicated by our construction of the Georgia Constitution itself, we need not, and, indeed, we should not, proceed to a consideration of the Federal constitutional issue.

I would find that the act of the Georgia House of Representatives was void as being in violation of the Georgia Constitution and would require that he be seated to the place to which he was elected.

APPENDIX C

Judgment Below

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

Civil Action No. 9895

JULIAN BOND, DR. MARTIN LUTHER KING, JR., and MRS. AREL KEYES, for themselves jointly and severally, and for all other similarly situated,

Plaintiffs,

—v.—

JAMES "SLOPPY" FLOYD, *et al.*,

Defendants.

ORDER

On the 17th day of January 1966 a complaint was filed in the United States District Court for the Northern District of Georgia, Atlanta Division, for injunctive relief in the above-styled cause. Pursuant to the prayers of the complaint a Three-Judge District Court was convened, consisting of Honorable Elbert P. Tuttle, Circuit Judge, Griffin B. Bell, Circuit Judge, and Lewis R. Morgan, District Judge. A motion for a preliminary injunction was filed on that same day. Various motions and an answer were filed by the Defendants, and it was stipulated that a final judgment might be rendered on the pleadings, the

stipulated facts and such other evidence as was introduced on the hearing of this matter. The Court, having heard oral argument on January 28, 1966, and having entered its opinion with respect thereto on February 10, 1966, and being advised in the premises,

IT IS NOW, THEREFORE, ORDERED, ADJUDGED AND DECREED as follows:

1.

The Motion to Dismiss for lack of jurisdiction is denied. The Motion to Strike Plaintiffs Dr. Martin Luther King, Jr., and Mrs. Arel Keyes for lack of standing is hereby granted.

2.

The prayers of the complaint are denied for the reasons set forth in the opinion and the complaint is hereby dismissed.

This 14th day of February 1966.

/s/ GRIFFIN B. BELL,
United States Circuit Judge.

/s/ LEWIS R. MORGAN,
United States District Judge.

I concur in that part of the Order denying the Motion to Dismiss for Want of Jurisdiction.

I dissent from the remainder of the Order.

/s/ ELBERT P. TUTTLE,
United States Circuit Judge.

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAR 26 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1125 87

JULIAN BOND, DR. MARTIN LUTHER KING, JR., and MRS. AREL KEYES,

Appellants,

—v.—

JAMES "SLOPPY" FLOYD, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF GEORGIA, *AMICI CURIAE*

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(2) Art. III, Sec. IV, Para. 5, and Art. III, Sec. VII, Para. 1 of the Georgia Constitution are impermissibly vague because they do not inform either a legislative aspirant, or those who elected him, of conduct which runs afoul of their provisions 6

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1125

JULIAN BOND, DR. MARTIN LUTHER KING, JR., and MRS. AREL KEYES,

Appellants,

—v.—

JAMES "SLOPPY" FLOYD, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF GEORGIA, *AMICI CURIAE*

Interest of *Amici*

The American Civil Liberties Union and the American Civil Liberties Union of Georgia, which file this brief with the consent of the parties, believe that the case at bar raises substantial federal questions under the First Amendment which should be heard and decided by this Court. The central question is whether a duly elected representative to a state legislature may be barred from taking his seat solely because his views on issues of public importance are incompatible with the views held by a majority of the legislature.

For the reasons set forth in this brief, we believe the Court should note jurisdiction so that that question, among others, may be fully briefed, argued and decided.

The Questions Are Substantial

(1) ART. III, SEC. IV, PARA. 5, AND ART. III, SEC. VII, PARA. 1 OF THE GEORGIA CONSTITUTION ON THEIR FACE AND AS CONSTRUED AND APPLIED IN THIS CASE VIOLATE APPELLANTS' RIGHTS OF FREE SPEECH AND ASSOCIATION AS GUARANTEED BY THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The three members of the court below were agreed that the case before them raised substantial federal questions (App. pp. 26, 66).[1] Likewise there was no dispute that the court had the power to decide the issue on the merits, notwithstanding the vigorous claims by the defendants below that "the subject matter is one which is vested within the exclusive jurisdiction of the House" (Defendants' Brief in Support of Motion to Dismiss, p. 7 et seq.), and that the complaint did not present a justiciable issue (*Id.* at p. 20 et seq.). As the majority opinion put it, "The court has jurisdiction over a denial of First Amendment rights by the state, and . . . the federal rights asserted here are not so insubstantial as to warrant our refusing jurisdiction" (App. pp. 25-26).

Having assumed jurisdiction, the court below proceeded to the merits and decided the case on the basis of a novel theory of the First Amendment which has no precedent in this Court, and which if left standing will seriously erode

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[1] The reference "App." is to the opinions below as contained in the Appendix of the Appellant's jurisdictional statement.

at least two fundamental constitutional principles which are directly served by the First Amendment: freedom of elected representatives to express themselves without hindrance on questions of public importance, and the right of voters freely to elect their legislative representatives. To nullify either of these rights makes a mockery of representative democracy. Nonetheless, both of these principles were emasculated by the decision of the court below.

The first premise of the novel theory adopted below is that "the free speech issue should be resolved in the context of giving effect to the separation of powers principle, and also our system of federalism to the extent that it permits self-government to the states under the supremacy of the Federal Constitution" (App. pp. 34-35). Drawing then upon *Barry* v. *United States*, 279 U. S. 597 (1929) and *Snowden* v. *Hughes*, 321 U. S. 1 (1944), the court derived the further premise that judicial interference in the electoral process is confined to those cases where the alleged wrong is clearly arbitrary in the due process sense, or purposefully and invidiously discriminatory in the equal protection sense (App. pp. 35-37). From these two premises the court concluded that "some restraint is to be practiced by the courts in considering state political questions concerning particular offices as distinguished from whole systems such as are prevalent in malapportionment, or racial discrimination. If this premise be correct, then there is room for a balance between the separation of powers principle, a system of federalism and individual rights afforded under the federal Constitution" (App. p. 37).

Having taken the balancing theory[2] into these uncharted wilds, the court then imported a second distinct theory

[2] *Barenblatt* v. *United States*, 360 U. S. 109 (1959), *Wilkinson* v. *United States*, 365 U. S. 399 (1961), and *Braden* v. *United States*, 365 U. S. 431 (1961).

enunciated by this Court in *Thompson* v. *Louisville*, 362 U. S. 199 (1960), and concluded that the denial of Bond's seat is justified if there is "any evidence which would support the denial" (App. p. 37).

Searching the record for "any evidence", the court finds two sorts. First, the SNCC statement is not merely "at war with the national policy of this country," it is also "a call to action based on race" (App. p. 38).[3] Second, the call to action is in "language which states that SNCC supports those men in this country who are unwilling to respond to a military draft" (*Ibid.*). Consequently, the court concluded, "We find and hold that [Bond's] statements and affirmation of the SNCC statement as they bore on the functioning of the Selective Service System could reasonably be said to be inconsistent with and repugnant to the oath which he was required to take. This suffices as a rational basis for the action of the House" (App. p. 40).

The upshot of the court's analysis is the transformation of the balancing test which, as enunciated by this Court, requires that the states have a "compelling and subordinating . . . interest"[4] in order to infringe First Amendment rights, into a test which allows those rights to be traduced

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[3] But see *Garner* v. *Louisiana*, 368 U. S. 157 (1961); *Taylor* v. *Louisiana*, 370 U. S. 154 (1962); *Edwards* v. *South Carolina*, 372 U. S. 229 (1963); *Fields* v. *South Carolina*, 372 U. S. 522 (1963); *Peterson* v. *City of Greenville*, 373 U. S. 244 (1963); *Lombard* v. *Louisiana*, 373 U. S. 267 (1963); *Shuttlesworth* v. *Alabama*, 373 U. S. 262 (1963); *Wright* v. *Georgia*, 373 U. S. 284 (1963); *Barr* v. *City of Columbia*, 378 U. S. 146 (1964); *Bouie* v. *South Carolina*, 378 U. S. 347 (1964); *Cox* v. *Louisiana*, 379 U. S. 536 (1965).

[4] *Gibson* v. *Florida*, 372 U. S. 539, 555 (1963).

so long as the state demonstrates no more than "a rational basis" for its action.

In fact, no "rational basis" was demonstrated. Needless to say, neither was there a compelling state interest or a clear and present danger. Under none of these tests could the appellant have been properly penalized for his statements. The SNCC statement, though no doubt provocative, was the apotheosis of free political comment. It did nothing more than express sympathy and support for those who object to being drafted, and encouraged work in the civil rights movement as "a valid alternative to the draft."[5] And Mr. Bond's remark about the "courage" of those persons who burn draft cards is hardly evidence of unfitness.

The issue this Court must decide in this case is whether an individual elected by the people to represent them in a state legislature may be cast out by the legislature because it finds his views too unorthodox for its taste.[6] For that reason, this case must be fully briefed and argued so that the nation can once again be instructed that transgressions upon the right of unfettered speech will not be tolerated.

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[5] The Selective Service Act specifically allows alternative civilian service for conscientious objectors. 50 App. U. S. C. Sec. 456(j).

[6] The special importance of unrestricted speech and the open clash of ideas within legislatures is reflected in Art. I, Sec. 6 of the United States Constitution which provides that . . . "for any speech or debate in either House, [Senators and Representatives] shall not be questioned in any other place." See *U. S.* v. *Johnson*, 34 U. S. L. Week 4161 (Feb. 24, 1966).

(2) ART. III, SEC. IV, PARA. 5, AND ART. III, SEC. VII, PARA. 1 OF THE GEORGIA CONSTITUTION ARE IMPERMISSIBLY VAGUE BECAUSE THEY DO NOT INFORM EITHER A LEGISLATIVE ASPIRANT, OR THOSE WHO ELECTED HIM, OF CONDUCT WHICH RUNS AFOUL OF THEIR PROVISIONS.

Under the terms of the Georgia constitutional provisions, as construed and applied below, a conscientious person who aspires to be a legislator must play a type of Russian roulette. He must speculate about the controversiality of his every statement and the intentions of his fellow legislators. If he guesses wrong he loses his political life. Consequently, as in *Baggett* v. *Bullitt,* 377 U. S. 360, 372 (1964):

> "We cannot say that this oath provides an ascertainable standard of conduct or that it does not require more than a State may command under the guarantees of the First and Fourteenth Amendments."

When First Amendment rights are at stake, the void-for-vagueness doctrine has special application. The effect of the Georgia oath's uncertain requirements, as exemplified in this case, is to seriously inhibit free and frank discussion of public issues by candidates and elected representatives. Aspirants for public office can, if elected, be assured of being seated only "by restricting their conduct to that which is unquestionably safe." *Baggett* v. *Bullitt, supra,* at p. 372.

We have no constitutional quarrel with that portion of the Georgia oath which calls for "support" of the United States and Georgia Constitutions. Rather, it is the succeeding language which is objectionable: ". . . and on all questions and measures which may come before me, I will

so conduct myself, as will, in my judgment, be most conducive to the interest and prosperity of this state."

This case provides tangible proof that the language claimed to be vague not only permits but encourages rummaging around in a grab bag of charges and accusations so that appellant Bond has no actual idea of the conduct which supported the Legislature's conclusion that he was incapable of taking the oath of office.

Thus, the petitions filed against Bond in the House of Representatives charged among other things that he did not support the Constitutions of the United States or Georgia, that he had committed treason, that he had violated the penal provisions of the Selective Service Act, that he had brought discredit to the Georgia House of Representatives (App. pp. 46-47), and that he had endorsed a "subversive policy statement" (App. p. 52).

Counsel for the Special Committee charged that appellant had committed treason (T. 68),[7] and had given aid and comfort to the enemy (T. 81-82).

The Special Committee's report contained no reasons for its recommendation (T. 91).

Initially, the Attorney General of Georgia, attorney for the defendants below, though declining to make any "contentions whatsoever with respect to Mr. Bond's right to make the statements attributed to him," said at the same time that those statements "were sufficient to put the House

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[7] The symbol "T" refers to the transcript of the proceedings before the Georgia House of Representatives which is part of the record on appeal.

on notice that possibly he did not feel bound to support the Constitution of the United States" (Defendant's Brief in Support of Motion to Dismiss, p. 31). A few days later, the Attorney General thought that Bond was disloyal to the United States (Defendant's Supplemental Brief, p. 5), had advocated violation of the Selective Service Act (*Id.* at pp. 5-6), and had committed sedition (*Id.* at p. 17).

The majority opinion below held that appellant's statements "as they bore on the functioning of the Selective Service System could reasonably be said to be inconsistent with and repugnant to the oath which he was required to take" (App. p. 40).

Any statute which will support such variegated charges without any agreement about which of appellant's statements supports the Legislature's conclusion, is, we believe, *ipso facto* void for vagueness.[8]

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[8] *Amici* also believe that the decision below in effect disenfranchised Mr. Bond's constituents in violation of the Fourteenth Amendment, and that House Resolution 19 is both an Ex Post Facto Law and Bill of Attainder in violation of Article I, Section 10 of the United States Constitution. We forego treating these questions since they are sufficiently dealt with in appellant's jurisdictional statement.

CONCLUSION

For the reasons stated above, the questions are substantial and the Court should note probable jurisdiction. Under the circumstances of the case, we also urge the Court to grant appellant's Motion to Advance.

Respectfully submitted,

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March 1966

SUPREME COURT, U. S.
APR 15 1966
JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. ~~1125~~ 87

JULIAN BOND, DR. MARTIN LUTHER KING, JR., AND MRS. AREL KEYES,

APPELLANTS,

v.

JAMES "SLOPPY" FLOYD, WILLIAM J. "BILL" LEE, ED T. FULFORD, J. TERRELL WEBB, W. JONES LANE, DAVID L. NEWTON, AND GEORGE T. SMITH,

APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

MOTION TO AFFIRM OR DISMISS, WITH SUPPORTING BRIEF ON BEHALF OF APPELLEES

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 1125

JULIAN BOND, DR. MARTIN LUTHER KING, JR., AND MRS. AREL KEYES,

APPELLANTS,

v.

JAMES "SLOPPY" FLOYD, WILLIAM J. "BILL" LEE, ED T. FULFORD, J. TERRELL WEBB, W. JONES LANE, DAVID L. NEWTON, AND GEORGE T. SMITH,

APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

MOTION TO AFFIRM OR DISMISS

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Come now the Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court, and move the Court: (1) to affirm the judgment from which the appeal in the above-styled case was taken, on the ground that the questions are so unsubstantial as not to need further argument; or, in the alternative, (2) to dismiss

this appeal on the ground that the matters in controversy in this action and upon this appeal have become abstract and moot by virtue of a Special Election held on February 23, 1966, to fill the vacancy in the seat for the 136th Representative District of Georgia.

This, the ____ day of April, 1966.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

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APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

BRIEF SUPPORTING MOTION TO AFFIRM OR DISMISS

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

STATEMENT

On June 16, 1965, Mr. Julian Bond was duly elected as the Representative for the 136th House District of the Georgia House of Representatives. On Thursday, Jan-

uary 6, 1966, in Atlanta, Georgia, the Student Non-Violent Coordinating Committee, just prior to the scheduled convening of the Georgia General Assembly, issued a statement urging Americans to refuse to respond to the draft.[1] Immediately following the issuance of this statement, Mr. Bond, the Communications Director of the Student Non-Violent Coordinating Committee in Atlanta, was interviewed by all forms of news media. Mr. Bond stated that he admired the courage of those who burned their draft cards; that he encouraged people not to participate in the Viet Nam war for any reason they might choose; and that as a "second-class" citizen he felt no obligation to support the war in Viet Nam.[2] Mr. Bond also stated that he did not know whether or not he would be willing to commit treason in the event the United States was engaged in a declared war.[3]

On January 10, 1966, on the floor of the House of Representatives, Mr. Bond was asked to step aside and refrain from taking the oath of office, as challenges to his qualifications for office had been filed by members of the House. The petitions challenging his qualifications were referred to a special committee of the House, which conducted a hearing on them later that same day. The petitions alleged, among other things, that Mr. Bond was not qualified to take the oath, required by both the United States and Georgia Constitutions, to support and uphold the Constitution of the United States.[4]

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[1] The full text of the statement is attached hereto as Appendix A.

[2] Appellants' Jurisdictional Statement, Appendix B, p. 24.

[3] Stipulation of Fact, p. 3, Exhibit 3, First Part of Transcript.

[4] Art. VI, Cl. 3, United States Constitution; Art. III, Sec. VI, Para. I, Constitution of Georgia. (Ga. Code Ann. § 2-1801).

After a full hearing, at which Mr. Bond was represented by counsel, the special committee recommended that Mr. Bond not be seated, and this report was adopted by the House by a vote of 184 to 12.

A Complaint was then filed in the United States District Court for the Northern District of Georgia, by Mr. Bond and two persons residing in his District. The Complaint alleged that the action of the House was unconstitutional in that it deprived Mr. Bond of freedom of speech; procedural due process of law, trial by jury, and constituted a Bill of Attainder or ex post facto law. The Complaint also attacked the validity of certain state constitutional provisions. In addition, the Complaint alleged that the action of the House disenfranchised Mr. Bond's constituents.

After responsive pleadings were filed, along with a stipulation of facts, and after a hearing, the Court, Chief Judge Tuttle dissenting, denied the injunctive relief sought and dismissed the Complaint. *Bond, et al.* v *Floyd*, — F. Supp. —, 34 Law Week 2442 (D. C. Ga. 1966).

SUMMARY OF ARGUMENT

I.

The judgment of the court below should be affirmed for properly denying the relief sought by the Appellants.

A.

The questions presented in the Jurisdictional Statement of the Appellants are not the questions before the Court. Julian Bond was challenged as to his qualifications

for office in the State Legislature. The Georgia Constitution, like that of the United States, provides that each House of the Legislature is the judge of the qualifications of its members. Article IV, Section VII, Paragraph I, Constitution of Georgia. The Supreme Court of Georgia has held that the term "qualifications" is broader than those requirements set forth in the State Constitution. *Rainey* v. *Taylor*, 166 Ga. 476, 143 S. E. 383 (1926). Mr. Bond was challenged on his ability to take the oath required of state legislators by both the United States and Georgia Constitutions. He was not excluded from public office because of his public statements.

Mr. Bond was adjudicated to be unqualified for public office. The statements made or endorsed by him were evidence on the question of qualifications. The determination that Mr. Bond was unable to take the required oath does not constitute an unconstitutional infringement on freedom of speech. Any infringement was, in this instance, an indirect one. Placed in the balance with the State's rights to take measures for its self-preservation, it cannot be said that an unconstitutional infringement of free speech occurred here. A review of the cases also shows that the statements of Mr. Bond would constitute a clear and present danger to the State and the Nation, and that in a criminal prosecution he would find no protection in the First Amendment. Finally, it is clear that Mr. Bond's call to action was at odds with the premises of democratic government and with the manner in which political change is to be effected. *Garrison* v. *State of Louisiana*, 379 U. S. 64, 75, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1965).

The Georgia Legislature had the power and duty to determine Mr. Bond's qualifications. The basis of the dis-

qualification was the oath to uphold and support the Constitution. The only remaining issue before the Court is whether or not substantive due process of law was afforded.

In order to give validity to the separation of powers concept on the state level, and to our system of federalism, some restraint should be exercised by courts considering state political questions concerning particular public offices. That restraint should be exercised by a court only requiring a national evidentiary basis for the constitutionally permissible action of the state legislature. That evidentiary basis is ample in the case at bar.

The exclusions from office in no way disenfranchised Mr. Bond's constituents. The events giving rise to his disqualification, occurred subsequent to his election. After his disqualification, his seat was declared vacant and a Special Election was held. The situation does not differ from a case in which a legislator becomes insane after election and prior to assuming his office. Ga. Code § 89-101(5).

House Resolution No. 19, declaring the result of the hearing, does not constitute a Bill of Attainder or ex post facto law. If the Legislature has the right to judge the qualifications of its members, then any declaration of that result could not be a Bill of Attainder or ex post facto law. With respect to qualifications, the House acts judicially and not legislatively. If a legislator is denied his seat on the basis of race, religion, or the manner in which he parts his hair, the action might be void for other constitutional infirmities, such as violation of the Equal Protection Clause. But the assertion of the Attainder Clause in this case reduces itself to absurdity.

Finally, the only relevant provisions of the Georgia Constitution at issue here are not unconstitutionally vague, as they are almost identical to a clause in the United States Constitution. The so-called "test oath for public office" referred to in Appellants' Jurisdictional Statement is contained in the Constitution of the United States.

B.

This Court should dismiss the appeal for another reason. The questions raised in the case are now moot, as a Special Election was held on February 23, 1966, to fill the seat for the 136th District. Mr. Bond entered this election, and won. New petitions contesting his qualifications for office were filed. New issues will no doubt be injected in the second contest which will be raised in another action. Therefore, the controversy represented by this appeal has become moot.

ARGUMENT

I.

A. The Judgment of the District Court Should Be Affirmed As the Questions Presented Do Not Warrant Further Consideration.

Julian Bond was not "tried" by the Georgia House of Representatives for the commission of a crime. Neither was he punished for expressing unpopular opinions. He was found to lack the necessary qualifications for the office of State legislator.

Every state legislature possesses the authority to determine the qualifications of its members. 49 *Am. Jur.*, "States, Territories, and Dependencies", § 34, p. 251. Congress has this power, and the General Assembly of Georgia also possesses this necessary authority. Article I, Section V, Clause I, United States Constitution; Article III, Section VII, Paragraph I, Constitution of Georgia (Ga. Code Ann: § 2-1901). Regardless of whether or not the word "qualifications" is restricted to those things enumerated in the Constitution, such as age or residence, the disqualification of Bond was permissible. The Constitution of the United States requires that every state legislator take an oath to uphold and support the Constitution of the United States. Article VI, Clause 3, United States Constitution. This necessarily includes support of valid statutes enacted pursuant to that Constitution, such as the Selective Service Act, *Gara v. United States*, 178 F. 2d 38 (6th Cir. 1949). The Constitution of Georgia requires an oath that a legislator support the state and Federal Constitutions.[5] Bond's public statements merely constituted evidence of his ability, or lack of it, to take these oaths. The duty of determining whether or not an individual is qualified to take this oath rests upon the legislative body, and not upon the individual.

The refusal to seat Bond did not constitute an unconstitutional impairment of his First Amendment right of free speech. This Court has never questioned the power of a state to safeguard public service from disloyal conduct. *Baggett* v. *Bullitt*, 377 U. S. 360, 379, 84 S. Ct. 1316, 12 L. Ed. 2d 377 (1964); *Gerende* v. *Board of Supervisors*,

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[5] Art. III, Sec. VI, Para. I, Constitution of Georgia. (Ga. Code Ann. § 2-1801).

34 U. S. 56, 71 S. Ct. 565, 95 L. Ed. 745 (1951). This right is even less questionable when based upon the oath required of state legislators appearing in Article VI, Clause 3 of the United States Constitution. *American Communications Association* v. *Douds*, 339 U. S. 382, 415, 70 S. Ct. 674, 94 L. Ed. 925 (1950). It seems obvious that any infringement of First Amendment rights in this case was an indirect one, justified by the public interest in the particular circumstances. *Barenblatt* v. *United States*, 360 U. S. 109, 126, 79 S. Ct. 1081, 3 L. Ed. 2d 1115 (1959).

The facts in this case also show that the State's action can be upheld on the basis of the "clear and present danger" test, although it is not necessary to do so. The statements either made or endorsed by Mr. Bond are more extreme than those involved in the Espionage Act cases. *Schenck* v. *United States*, 249 U. S. 47, 39 S. Ct. 247, 63 L. Ed. 470 (1919); *Frohwerk* v. *United States*, 249 U. S. 204, 39 S. Ct. 249, 63 L. Ed. 561 (1919); *Debs* v. *United States*, 249 U. S. 211, 39 S. Ct. 252, 63 L. Ed. 566 (1919). While Georgia of course does not maintain that its refusal to seat Bond was done in furtherance of the Espionage Act of 1917,[6] it would seem that the State's action, pursuant to another constitutional requirement, could not be invalid if Mr. Bond's statements were not protected under the "clear and present danger" doctrine.

The First Amendment does not allow a citizen to urge others to violate the law. A commitment to uninhibited, robust debate on public issues is indeed the arch supporting our democratic system of government; but the orderly and legal manner in which political or social changes are to be achieved is the keystone of that arch. Mr. Bond's

[6] 40 Stat. 217, 219.

statements encouraged others to violate the Selective Service Act for any reasons. This speech is not protected. *Garrison* v. *State of Louisiana*, 379 U. S. 64, 75, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1965).

Having placed the First Amendment in its proper perspective, the duty then evolved upon the court below to determine if substantive due process of law had been afforded to Bond. The essence of substantive due process is the prohibition of arbitrary action by the State. This issue was resolved below in the favor of the State.

In order to make the requisite determination, it is necessary for the federal courts to choose a standard of review. The District Court properly concluded that the inquiry must be made in the context of two principles; a respect for separation of powers on the State level, and the place of state government under our federal system.[7] The courts on a given level of government have consistently refused to review the action of the legislative branch in judging qualifications. *Re. Chapman*, 166 U. S. 661, 17 S. Ct. 677, 41 L. Ed. 1154 (1897); Story, *Comm. on the Constitution*, Vol. II, § 831, p. 294. Although under certain circumstances a federal court could and should review such action by a state legislature, it is equally clear that some control of internal affairs is left to state legislatures. *Snowden* v. *Hughes*, 321 U. S. 1, 64 S. Ct. 397, 88 L. Ed. 497 (1944). In order to give credence to these principles, the District Court reviewed the facts to determine whether or not there was a rational evidentiary basis for the ruling of the Georgia House of Representatives. *Garner* v. *Louisiana*, 368 U. S. 157, 82 S. Ct. 248, 7 L. Ed. 2d 207 (1961); *Thompson* v. *Louisville*, 362 U. S. 199, 80

[7] Appellants' Jurisdictional Statement, Appendix B, pp. 34, 35.

S. Ct. 624, 4 L. Ed. 2d 654 (1960). The District Court found that the statements of Bond constituted a rational basis for concluding that he was not qualified to take the required oath. This Court should affirm that decision.

The other questions presented in the Jurisdictional Statement are also meritorious. Appellants contend that the action of the Georgia House disenfranchised Mr. Bond's constituents in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and also constituted a Bill of Attainder or ex post facto law. These positions are contradictory and somewhat confusing. Both freedom of speech and equal protection apply to state action. If Georgia's action did indeed violate Bond's First Amendment rights, then action should fall on that ground, and not on equal protection. On the other hand, if the House had the power to determine Mr. Bond's qualifications, and did so in a proper manner, Mr. Bond's constituents were deprived of no legally protectable interest. As soon as the vacancy was declared, a Special Election was called and held to fill the seat for the 136th Representative District. A temporary deprivation of representation does not violate equal protection of the laws. See *Barry* v. *United States*, 279 U. S. 597, 49 S. Ct. 452, 73 L. Ed. 867 (1929).

The argument pitched on Bill of Attainder or ex post facto is also frivolous and unfounded. Ordinarily, a legislature is precluded from disqualifying persons or ascertainable groups from office, but this prohibition does not apply to the judging of the qualifications of its members. In judging qualifications, both Congress and a state legislature sit in a judicial capacity. *Barry* v. *U. S.*, *supra*, at p. 613. This situation, like impeachment of the executive, vests the legislative branch with judicial powers. The ex-

ercise of that power cannot result in a prohibited Bill of Attainder or ex post facto law. The result may be invalid for some other reason, such as failure to accord due process, but it can never be attainder, as the procedure itself is constitutionally authorized.

Finally, the Appellants' claim that certain Georgia constitutional and statutory provisions are void for vagueness under the Fourteenth Amendment. Although it is clear that the decision below did not rest on those provisions, it is equally clear that those provisions are not vague, being substantially identical to provisions in the United States Constitution. In any event, the meaning of the term "qualifications" is irrelevant here, as the action of the House was based upon, among other things, an oath in the United States Constitution.

This Court should affirm the decision of the court below, as the questions actually raised in that case do not warrant further consideration.

B. In the Alternative, This Court Should Dismiss the Appeal As the Controversy Has Become Moot.

The action of the House denying a seat to Mr. Bond was taken on January 10, 1966. A vacancy was thereupon declared in the seat for this District, and a Special Election was called pursuant to State law.[8]

At this Election, held on February 23, 1966, Mr. Bond re-offered and was the successful candidate. He has been so certified by the Secretary of State. New petitions chal-

[8] Ga. Code Section 34-805.

lenging his qualifications have been filed, and they are now pending before the House Rules Committee for a hearing. The General Assembly has already adjourned for this year, and any special sessions this year are highly unlikely. The Complaint did not seek to recover the compensation to which Bond would have been entitled had his ouster been held erroneous, and legislators draw compensation only while the General Assembly is in session, except with respect to interim committee service.

If the pending hearings result in the seating of Mr. Bond, he will take office by virtue of his election in the February Special Election, and the question as to the validity of the previous refusal of the House to seat him will be moot. If the pending hearings result in his being again refused a seat, new and additional issues likely will be injected, which will undoubtedly be asserted in this or another action. These facts, which this Court may determine by extrinsic evidence, *Mills* v. *Green*, 159 U. S. 651, 653, 16 S. Ct. 132, 40 L. Ed. 293 (1895), render the controversy moot. *Heitmuller* v. *Stokes*, 256 U. S. 359, 41 S. Ct. 522, 65 L. Ed. 990 (1921); *Brownlow* v. *Schwartz*, 261 U. S. 216, 43 S. Ct. 263, 67 L. Ed. 620 (1923). The fact that the constitutionality of a statute was attacked below and remains for decision is immaterial. *Oil, Chemical & Atomic Workers' Union* v. *Missouri*, 361 U. S. 363, 368, 80 S. Ct. 391, 4 L. Ed. 2d 373 (1960). This Court should not decide abstract propositions. *Mills* v. *Green*, *supra*. The fact that new proceedings below are likely in which some of the same issues will be raised again does not alter the rule, as the issues can be decided on a subsequent appeal. *St. Pierre* v. *United States*, 319 U. S. 41, 43, 63, S. Ct. 910, 87 L. Ed. 1199 (1943). Even where the case will not be moot in the event certain developments

subsequently transpire below, this Court will not decide the case but will remand for further consideration by the District Court. *Fortson* v. *Toombs*, 379 U. S. 621, 85 S. Ct. 598, 13 L. Ed. 2d 527 (1965).

CONCLUSION

The judgment of the United States District Court for the Northern District of Georgia, sought to be reviewed, should be affirmed on the ground that the questions upon which the decision below depended were fully explored, correctly answered, and do not warrant or justify further argument. In the alternative, the appeal should be dismissed for mootness.

Respectfully submitted,

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APPENDIX A

The Student Nonviolent Coordinating Committee has a right and a responsibility to dissent with United States foreign policy on an issue when it sees fit. The Student Nonviolent Coordinating Committee now states its opposition to United States' involvement in Viet Nam on these grounds:

We believe the United States government has been deceptive in its claim of concern for freedom of the Vietnamese people, just as the government has been deceptive in claiming concern for the freedom of colored people in such other countries as the Dominican Republic, the Congo, South Africa, Rhodesia and in the United States itself.

We, the Student Nonviolent Coordinating Committee, have been involved in the black people's struggle for liberation and self-determination in this country for the past five years. Our work, particularly in the South, has taught us that the United States government has never guaranteed the freedom of oppressed citizens, and is not yet truly determined to end the rule of terror and oppression within its own borders.

We ourselves have often been victims of violence and confinement executed by United States government officials. We recall the numerous persons who have been murdered in the South because of their efforts to secure their civil and human rights, and whose murderers have been allowed to escape penalty for their crimes.

The murder of Samuel Young in Tuskegee, Ala., is no different than the murder of peasants in Viet Nam, for both Young and the Vietnamese sought, and are seeking, to secure the rights guaranteed them by law. In each

case, the United States government bears a great part of the responsibility for these deaths.

Samuel Young was murdered because United States law is not being enforced. Vietnamese are murdered because the United States is pursuing an aggressive policy in violation of international law. The United States is no respecter of persons or law when such persons or laws run counter to its needs and desires.

We recall the indifference, suspicion and outright hostility with which our reports of violence have been met in the past by government officials.

We know that for the most part, elections in this country, in the North as well as the South, are not free. We have seen that the 1965 Voting Rights Act and the 1964 Civil Rights Act have not yet been implemented with full federal power and sincerity.

We question, then, the ability and even the desire of the United States government to guarantee free elections abroad. We maintain that our country's cry to "preserve freedom in the world" is a hypocritical mask behind which it squashes liberation movements which are not bound, and refuse to be bound, by the expediencies of United States cold war policies.

We are in sympathy with, and support, the men in this country who are unwilling to respond to a military draft which would compel them to contribute their lives to United States aggression in Viet Nam in the name of the "freedom" we find so false in this country.

We recoil with horror at the inconsistency of a supposedly "free" society where responsibility to lend oneself to military aggression. We take note of the fact that 60 per cent of the draftees from this country are Negroes

called on to stifle the liberation of Viet Nam, to preserve a "democracy" which does not exist for them at home.

We ask, where is the draft for the freedom fight in the United States?

We therefore encourage those Americans who prefer to use their energy in building democratic forms within this country. We believe that work in the civil rights movement and with other human relations organizations is a valid alternative to the draft. We urge all Americans to seek this alternative, knowing full well that it may cost them lives — as painfully as in Viet Nam.

CERTIFICATE OF SERVICE

I, ALFRED L. EVANS, JR., one of the attorneys for Appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of April, 1966, I served a copy of the foregoing Motion to Affirm or Dismiss on the Appellants by mailing a copy in a duly addressed envelope with postage prepaid to his Counsel of Record, Howard Moore, Jr., Esq., 859½ Hunter Street, N. W., Atlanta, Georgia 30314.

ALFRED L. EVANS, JR.
Of Counsel for Appellees

SUPREME COURT, U. S.

MAY 4 1966

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1965

No. ~~1125~~ 87

JULIAN BOND, DR. MARTIN LUTHER KING, JR., and MRS. AREL KEYES, for themselves jointly and severally, and for all others similarly situated,

Appellants,

v.

JAMES "SLOPPY" FLOYD, WILLIAM J. "BILL" LEE, ED T. FULFORD, J. TERRELL WEBB, W. JONES LANE, DAVID L. NEWTON, ETC. and GEORGE T. SMITH, ETC.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA (ATLANTA DIVISION)

BRIEF IN OPPOSITION AND MOTION TO ADVANCE

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IN THE

Supreme Court of the United States

October Term, 1965

No. 1125

JULIAN BOND, DR. MARTIN LUTHER KING, JR., and MRS. AREL KEYES, for themselves jointly and severally, and for all others similarly situated,

Appellants,

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JAMES "SLOPPY" FLOYD, WILLIAM J. "BILL" LEE, ED T. FULFORD, J. TERRELL WEBB, W. JONES LANE, DAVID L. NEWTON, ETC. and GEORGE T. SMITH, ETC.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA (ATLANTA DIVISION)

BRIEF IN OPPOSITION

Pursuant to paragraph 3 of Rule 16 of the Rules of this Court, the appellants file this brief in opposition to the appellees' motion to affirm or dismiss.

Statement

Appellees begin with an inaccurate statement of the facts. It is not true that the Student Non-Violent Coordinating Committee (SNCC) issued a statement "urging Americans to refuse to respond to the draft" (Br. 4). The concluding paragraphs of the SNCC statement state its position:

> "We ask, where is the draft for the freedom fight in the United States?

> We therefore encourage those Americans who prefer to use their energy in building democratic forms within this country. We believe that work in the civil rights movement and with other human relations organizations is a valid alternative to the draft. We urge all Americans to seek this alternative, knowing full well that it may cost them lives—as painfully as in Viet Nam." (Br. 18)

The quotations ascribed to Mr. Bond (Br. 4) are taken out of context. A reading of the entire interview shows that he was only expressing his pacifist views. An accurate statement of the relevant facts may be found in the opinions below (Jur. St. 18-66).

Argument

1. Appellees make an extended argument on the merits with which we disagree, as appears from the jurisdictional statement. It is premature to present such an argument or to respond to it. As Mr. Justice Harlan has said, "the appellant in a case that is not obviously devoid of substance comes to the Court as a matter of right, and disposition of such a case involves adjudication on the merits with all of its consequences." Harlan, *Manning the Dikes*, 13 Record of N.Y.C.B.A. 541 546 (1958). Whatever the Court's ultimate disposition of the case on the merits, the jurisdictional statement and the opinions below show that substantial federal constitutional questions are presented which deserve full consideration by the Court.

2. While the appellees argue that "the controversy has become moot" (Br. 13), they actually mean that they might in the future seek to moot the controversy. More specifically, they suggest that the House Rules Committee, after conducting hearings upon Mr. Bond's second election, *might* hold that he is qualified to sit in the legislature.

There are two defects in this reasoning. First, the instant suit seeks to determine Mr. Bond's right to sit pursuant to his first election, and a second election in which he ran to protect his vested rights cannot affect those rights. Second, if acceptance of Mr. Bond's credentials by the Rules Committee will be deemed relief from the initial disqualification, the controversy is not moot because by the terms of Rule 258 the acceptance is not deemed final until affirmed by the House.[1]

3. Appellees' alternative argument that the General Assembly has adjourned for the year is quite irrelevant. Mr. Bond's term does not expire until December 31, 1966. The constituents of the 136th District have a right to be represented in any special session called by the Governor and Mr. Bond has a right to sit during such session and be given committee assignments.[2] The controversy is, again, not moot because Mr. Bond has not been paid the salary to which he is entitled.[3] The recent appointment of the committee to pass again upon Mr. Bond's qualifications is proof of the viability of the controversy, as is its postponement of a hearing to May 23, 1966 over Mr. Bond's objections.

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[1] Rule 258 of the House provides in part that "[t]he action of the committee shall be considered the action of the House until it next convenes at which time it shall affirm or reverse the committee, or take such other action thereon as it sees fit."

[2] Rule 212 of Georgia House of Representatives: "No member of the House shall be appointed to or serve on less than two (2) . . . standing committees of the House. . . ."

[3] To avoid amending the complaint by adding the State Treasurer as a party defendant in the court below, the parties stipulated that in the event that Mr. Bond prevailed the State of Georgia would pay his legislative salary (R. 302). An officer who has been wrongfully excluded from his office is entitled to the salary; the salary is deemed to attach to the office for the period of wrongful exclusion, not to the performance of the duties. Fordham, *Local Government Law* 283 (1949); *Walker* v. *Hughes*, 42 Del. 447, 36 A. 2d 47 (1944).

4. The authorities cited by appellees are inapposite and shed no light upon what appellees mean by "new and additional issues" which they allege will be introduced if the committee denies Bond his seat.

In *Heitmuller* v. *Stokes*, 256 U. S. 359, a landlord's suit for possession of land was deemed mooted when he sold the property. In *Brownlow* v. *Schwartz*, 261 U. S. 216, an owner's suit for a building permit was held moot when (i) the permit was issued and (ii) the party seeking relief sold the land. In *Oil, Chemical & Atomic Worker's Union* v. *Missouri*, 361 U. S. 363, an appeal by workers who were enjoined from striking was held moot after the strike ceased and a new contract was signed. Thus, in each of these cases a decision of the Court would have been academic (*Mills* v. *Green*, 159 U. S. 651) because the plaintiff could no longer be given the relief sought. In the instant case, however, if appellant Bond is not seated by the Rule 258 Committee, he will still be entitled to his seat and his salary, the relief he presently seeks in this Court.

Appellees make fleeting reference to *Fortson* v. *Toombs*, 379 U. S. 621. *Fortson* involved an injunction based upon a finding that the Georgia General Assembly was unconstitutionally malapportioned. The injunction, *inter alia*, prohibited the 1964 Assembly from placing an amendment to the State Constitution on the ballot. The Court declined to rule upon a motion to dismiss because of supervening events until after argument. Then, upon the application of the successful party below, the Court remanded the matter to the district court to fashion new relief. In the instant case it is the parties committing the injury who seek to avoid a judicial decision.

5. It is arguable that the mootness rule would not preclude consideration of this case even if Mr. Bond were voluntarily reinstated to his position, given whatever committee assignments he would otherwise have received, and paid his salary. This Court has held that there can be

no mootness where a continuing public interest requires a determination of issues, despite the apparent cessation of the illegal conduct (*Walling* v. *Helmerich & Payne, Inc.*, 323 U. S. 37; *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498; *United States* v. *Trans-Missouri Freight Ass'n.*, 166 U. S. 290) even where the likelihood of resumption of such conduct appears indeed remote, *United States* v. *W. T. Grant Co.*, 345 U. S. 629. But that issue is not before the Court since appellees are continuing to violate appellants' constitutional rights.

CONCLUSION

The appellees' motion to affirm the judgment of the District Court or dismiss the appeal should be denied.

May 2, 1966.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1965

No. 1125

JULIAN BOND, DR. MARTIN LUTHER KING, JR., and MRS. ABEL KEYES, for themselves jointly and severally, and for all others similarly situated,

Appellants,

v.

JAMES "SLOPPY" FLOYD, WILLIAM J. "BILL" LEE, ED T. FULFORD, J. TERRELL WEBB, W. JONES LANE, DAVID L. NEWTON, ETC. and GEORGE T. SMITH, ETC.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA (ATLANTA DIVISION)

MOTION TO ADVANCE

Pursuant to Rule 43(4) of the Rules of this Court, appellants move this Court to advance the case for argument to the first week of argument in the October Term, 1966, if the Court notes probable jurisdiction or postpones consideration of jurisdiction.

1. Advancement is required because of the importance of the constitutional rights involved, the continuing injury to appellants, and the possibility of mootness if the case is not decided early this next Term.

2. The issues of freedom of speech and of franchise, involved in this case, are of public importance. This is apparent from the opinions below, the jurisdictional statement and the appellees' motion to affirm or dismiss.

3. Mr. Bond's term of office will expire on December 31, 1966. After that date, a substantial issue of mootness will arise. A decision by the Court before December 31, 1966 is the only assurance that the important rights involved can be adjudicated. Such a timely decision is likely only if the appeal herein is heard early in the October, 1966 Term.

4. The appellants continue to be injured so long as the appellant Bond is denied the legislative office to which he was elected; as matters now stand, he cannot serve on any committee and he cannot participate in any special legislative session that might be called. His constituents remain disenfranchised.

5. It is likely that Mr. Bond will continue to be re-elected and that, as appellees' motion indicates, they will continue to deny him a seat in the legislature because of his public expressions of opinion. Hence, the resolution of the issues on the merits this coming Term will avoid repeated litigation by appellees. It may also prevent similar actions by other state legislatures and the resulting litigation in the federal courts.

6. Certain of these considerations were urged in appellants' earlier motion to advance to the week of May 2, 1966 which the Court denied on March 20, 1966. Favorable action upon the present motion will not present the calendar problem arising from the late addition of a case for argument at the end of the October, 1965 Term, and meets the appellees' argument upon the prior motion that the im-

portance of the issues requires that appellees be given full time for preparation of their briefs.

WHEREFORE, appellants respectfully pray that the Court grant this motion to advance.

Respectfully submitted,

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May 2, 1966.

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IN THE

Supreme Court of the United States

October Term, 1965

No. ~~1125~~ 87

JULIAN BOND, DR. MARTIN LUTHER KING, JR., and MRS. AREL KEYES,

Appellants,

v.

JAMES "SLOPPY" FLOYD, WILLIAM J. "BILL" LEE, ED T. FULFORD, J. TERRELL WEBB, W. JONES LANE, DAVID L. NEWTON and GEORGE T. SMITH,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA (ATLANTA DIVISION)

BRIEF *AMICUS CURIAE* SUBMITTED BY EMERGENCY CIVIL LIBERTIES COMMITTEE

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IN THE

Supreme Court of the United States

October Term, 1965

No. 1125

JULIAN BOND, DR. MARTIN LUTHER KING, JR., and MRS. AREL KEYES,

Appellants,

v.

JAMES "SLOPPY" FLOYD, WILLIAM J. "BILL" LEE, ED T. FULFORD, J. TERRELL WEBB, W. JONES LANE, DAVID L. NEWTON and GEORGE T. SMITH,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA (ATLANTA DIVISION)

BRIEF *AMICUS CURIAE* SUBMITTED BY EMERGENCY CIVIL LIBERTIES COMMITTEE

Statement

The *amicus curiae,* Emergency Civil Liberties Committee, is an unincorporated association organized for the purpose of protecting the civil liberties and civil rights of the people of the United States, with particular reference to the rights guaranteed by the First, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States. The Committee files, from time to time, *amicus curiae* briefs in cases pending in this and other courts in which civil liberties and civil rights issues appear to be of substantial constitutional importance. In the present case there is an inter-

twining of civil liberties and civil rights issues which *amicus* believes to be of particular importance.

This brief, which is filed with the consent of the parties, is directed to (1) the constitutionally protected franchise rights and First Amendment rights of the citizens of the 136th House Election District and (2) the free speech rights of appellant Bond.

ARGUMENT

POINT I

Exclusion of appellant Bond from his elected position violated the constitutionally protected rights and freedoms of the citizens of the 136th House Election District.

A. Appellants King and Keyes have Judicial Standing to Bring Before this Court the Violations of the Constitutional Rights of the Constituents of the Election District.

The decision of the court below that appellants King and Keyes did not have standing to bring the complaint is contrary to the decisions of this Court which are examined and discussed at length in *Baker* v. *Carr,* 369 U. S. 186, 206-208 (1962). The appellants King and Keyes and all those similarly situated have significant interests which have been injured by the proceedings below. Their rights to a meaningful exercise of both the franchise and the First Amendment freedoms without impairment by State action are judicially recognized as rights secured by the Constitution for which an individual may claim the protection of the laws. See *Baker* v. *Carr, supra; Gray* v. *Sanders,* 372 U. S. 368, 375 (1963).

The finding of the court below cannot be placed upon an alleged temporary lack of representation since the record is undisputed that the constituents of the 136th House Dis-

trict have now twice been denied representation by the person elected by an overwhelming vote of the District. This is not a case where there is a pending inquiry to determine what action should be taken. Rather, the State has acted and has thereby denied the constituency of their franchise rights and their political freedoms under the First Amendment.

Nor can the Court rely upon the assumption that the complaint of Mr. Bond alone will resolve every conceivable issue in this case. As discussed below, the exclusion of Mr. Bond has resulted in a particular, legally cognizable injury to the residents of the 136th House District by destroying the effectiveness of their vote and of their political freedoms under the First Amendment. These rights, it is submitted, are most properly brought before this Court by the appellants King and Keyes and those similarly situated who are the direct victims of the injury.

B. The Exclusion Violated the Constitutionally Protected Franchise Rights of the Citizens of the Election District.

The present case touches principles at the foundation of our liberties—principles which were evolved during the early years of the founding period, and which remain to this day a constant concern of this Court.

The right of the people to be represented in the governing bodies by persons freely chosen by the people was cultivated early in the American soil. The First Continental Congress declared in 1774:

> "That the foundation of English liberty, and of all free government, is a right in the people to participate in their legislative council . . ." *

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* *Declaration and Resolves of the First Continental Congress,* October 14, 1774, Resolved 4, Charles C. Tansill (ed.), "Documents Illustrative of the Formation of the Union of the American States," 69th Cong., 1st Sess., 1927, House Doc. 398, 1-5.

More than one hundred years earlier, colonial lawmakers had declared:

> "It is the libertie of the freemen to choose such deputies for the Generall Court out of themselves, either in their owne Townes or elsewhere as they judge fitest." *

Two years after the First Continental Congress, the newly declared independent colonies reaffirmed the fundamental nature of the right of the people to participate in the government through the free election of representatives of their choice. Section 6 of the Delaware Declaration of Rights (September 11, 1776),** for example, declared:

> "That the right in the people to participate in the Legislature, is the foundation of liberty and of all free government, and for this end all elections ought to be free and frequent. . . ."

Similarly, Article V of the Constitution of Maryland (November 3, 1766)*** provided:

> "That the right in the people to participate in the Legislature is the best security of liberty, and the foundation of all free government; for this purpose elections ought to be free and frequent. . . ."

Recent years have witnessed the full growth of these historical roots. Two years ago, Chief Justice Warren wrote for the Court that "history has seen a continuing expansion of the scope of the right of suffrage in this country. The right to vote freely for the candidate of

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* William H. Whitmore (ed.), *The Colonial Laws of Massachusetts, 1672* (Boston, 1890), 33-61.

** Laws of the State of Delaware, 1700-1797 (New Castle, 1797), I, Appendix, 79-81.

*** Francis N. Thorpe (ed.), *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws* (Washington, 1909), III, 1686-91.

one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds* v. *Sims*, 377 U. S. 533, 555 (1964).*

The equal protection of the laws guaranteed by the Fourteenth Amendment prohibits a State from denying equality to the people of the State in participating in the legislature. The prohibition applies whether the State has directly excluded a group from the franchise or has structured the legislative bodies in such a manner as to make the people's participation therein, through the choice of representatives therefor, unequal and disproportionate.**

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* Also see *Rice* v. *Elmore*, 165 F. 2d 387, 392 (C.C.A. 4th Cir. 1947), *cert. den.* 333 U. S. 875 (1948), where Parker C. J., writing for a unanimous Court, declared:

> "An essential feature of our form of government is the right of the citizen to participate in the governmental process. The political philosophy of the Declaration of Independence is that governments derive their just powers from the consent of the governed; and the right to a voice in the selection of officers of government on the part of all citizens is important, not only as a means of insuring that government shall have the strength of popular support, but also as a means of securing to the individual citizen proper consideration of his rights by those in power. The disfranchised can never speak with the same force as those who are able to vote. The Fourteenth and Fifteenth Amendments were written into the Constitution to insure to the Negro, who had recently been liberated from slavery, the equal protection of the laws and the right to full participation in the process of government. These amendments have had the effect of creating a federal basis of citizenship and of protecting the rights of individuals and minorities from many abuses of governmental power which were not contemplated at the time."

** See: *Reynolds* v. *Sims*, *supra*, at pp. 554-555:

> "Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections. A consistent line of decisions by this Court in cases involving attempts to deny or restrict the right of suffrage has made this indelibly clear. It has been repeatedly recognized that all qualified voters have a constitutionally pro-

The exclusion of appellant Julian Bond from his elected office in the Georgia House of Representatives is no less a denial of the equal protection of the laws.

The principle of "one man, one vote", found by this Court to be mandated by the Fourteenth Amendment guarantee of equal protection, is rendered a nullity if it be permissible for the legislature to exclude a representative elected by the majority of the votes cast. For the constituents of that representative, the principle of "one man, one vote" has been replaced by "majority of the people, no vote", and the right to equal participation in the Legislature has been denied them. This Court's findings that "representative government is in essence self-government through the medium of elected representatives of the people", that "each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies" and that "most citizens can achieve this participation only as qualified voters through the election of legislators to represent them" *, prohibits both denial of the vote and denial of office to the person elected. Either denial destroys representative government and deprives the residents of the effected

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tected right to vote, *Ex parte Yarbrough,* 110 U. S. 651, and to have their votes counted, *United States* v. *Mosley,* 238 U. S. 383. . . . The right to vote can neither be denied outright, *Guinn* v. *United States,* 238 U. S. 347, *Lane* v. *Wilson,* 307 U. S. 268, nor destroyed by alteration of ballots, see *United States* v. *Classic,* 313 U. S. 299, 315, nor diluted by ballot-box stuffing, *Ex parte Siebold,* 100 U. S. 371, *United States* v. *Saylor,* 322 U. S. 385. As the court stated in *Classic,* 'Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted. . . .' 313 U. S., at 315. . . . And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."

* *Reynolds* v. *Sims, supra,* at p. 565 of 377 U. S.

district of an equal, full and effective participation in the governmental political processes.

The actual facts of the present case dramatically illustrate the principle that the constitutional right to equal participation in the legislature necessarily encompasses the right to be represented by the person freely chosen by the voters. Recognition of the right to equality in the franchise led to the very creation of the 136th House District following the reapportionment decision in *Toombs* v. *Forston*, 241 F. Supp. 65 (N.D. Ga., 1965). Exercising their right of equal franchise, the constituents of the 136th House District chose Mr. Bond to represent them. Having excluded Mr. Bond, the Georgia House of Rrepresentatives has not only denied equality of the franchise to the people of the 136th House District, it has, in effect, denied the franchise completely.

In assessing the constitutional status of the exclusion of appellant Bond from the Legislature, the fact that the 136th House District is composed overwhelmingly of Negro constituents is entirely relevant. Sixteen years ago it was noted in this Court that the malapportionment then existing under the Georgia County Unit System resulted in the substantial disenfranchisement of the urban Negro population of Georgia. *South* v. *Peters*, 339 U. S. 276, 277 (1950) (dissenting opinion). The struggle of the Negro population of Georgia for equality and for full participation in the governmental processes has been long and tenacious.* See *e.g. United States* v. *Guest*, U.S.S.C. 34 L.W. 4323 (March 28, 1966) (conspiracy to interfere with Negro citizens' exercise of rights and privileges secured by the Constitution; *Calhoun* v. *Latimer*, 377 U. S. 263 (1964) (school de-

* The militant civil rights struggle of the Negro population of the South and the ensuing intense resentment and opposition of the politically dominant white communities is a matter of which this Court may properly take notice. *NAACP* v. *Button*, 371 U. S. 415, 435 (1963).

segregation); *Wright* v. *Georgia*, 373 U. S. 284 (1963) (city playground facilities); *Holmes* v. *City of Atlanta*, 350 U. S. 879 (1955) (city golf course); *Stell* v. *Savannah-Chatham County Board of Education*, 333 F. 2d 55 (5th Cir. 1964), *cert. den. sub. nom. Roberts* v. *Stell*, 379 U. S. 933 (1964) (school desegregation); *Kelly* v. *Page*, 335 F. 2d 114 (5th Cir. 1964) (picketing and marching to eliminate racial discrimination); *United States* v. *Bibb County Democratic Executive Comm.*, 222 F. Supp. 493 M.D. Ga. 1962) (racial distinctions in use of voting facilities and polling places and in tabulating votes); *Anderson* v. *Courson*, 203 F. Supp. 806 (M.D. Ga. 1962) (maintenance of racially segregated voting lists); *United States* v. *Raines*, 189 F. Supp. 121 (M.D. Ga. 1960) (separate registration application forms and separate registration and voting records).

The reapportionment of the House Districts with the creation of the 136th House District gave to a population, previously disenfranchised and denied equality in the participation in government and in the benefits of government, the essence of the political freedoms declared by the Founding Fathers, implied at the foundations of our representative governmental structure and guaranteed by the First and Fourteenth Amendments. In determining the impact of defendants' actions in excluding the person twice elected to the Legislature from the 136th House District upon the First and Fourteenth Amendment rights of the residents of that District, it is significant that the voters who have thereby been deprived of any meaning to their vote are predominantly of that segment of the population previously denied the franchise and equal protection. Both history and the substance of the Amendment require recognition of these facts, for the achievement of basic civil and political rights to the Negro population was the "primary concern" of the framers of the Fourteenth Amendment. *Shelley* v. *Kraemer*, 334 U. S. 1, 23 (1948); see also: *Rice* v. *Elmore, supra.*

The claim of the House's jurisdiction over the qualifications of its members cannot validate the exclusion of Mr. Bond. No matter how sophisticated the mode or rationale, the Constitution is concerned with and prohibits the essential disenfranchisement and denial of equality which has been the result herein. Cf. *Gomilion* v. *Lightfoot*, 364 U. S. 339, 342 (1960).

C. The Exclusion Violated the First Amendment Rights of the Citizens of the Election District.

The rights embodied in the First Amendment are essential to the exercise of political freedom. These rights are not Pyrrhic exercises but represent the constitutional conclusion that to keep the nation free, the State may not abridge these political rights. Nearly forty years ago, Mr. Justice Brandeis noted the intention of the Founding Fathers to guarantee free speech as a means of assuring political independence and liberties.

> "Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable

> government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of government majorities, they amended the Constitution so that free speech and assembly should be guaranteed." *Whitney* v. *California,* 274 U. S. 357, 375-376, (1927).

It is through the intertwining of the First Amendment with the political ends of democracy that this Court, commencing with the opinions of Mr. Justices Holmes and Mr. Justice Brandeis, has evolved the only sustaining restriction upon First Amendment rights—the clear and present danger doctrine.* Free speech remains forever constitutionally protected and inviolate when it seeks political change not inconsistent with the Constitution of the United States.

In *Stromberg* v. *California,* 283 U. S. 359, 369 (1931), Chief Justice Hughes, for the Court, declared:

> "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."

Where the ends are within the ambit of constitutional change, or where the activities involved were for protected

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* While *amicus* does not view the doctrine of the clear and present danger as a permissible or wholesome restriction of the liberties protected against abridgement by the express language of the First Amendment, in the instant case, as demonstrated herein, the exclusion of Appellant Bond destroys the basis upon which rests even the more limited view of the First Amendment implied in the clear and present danger doctrine.

ends, this Court has without failure held unconstitutional and void any attempt to restrict such activities. Thus, the Court has carefully and precisely noted that First Amendment freedoms conducted within the electoral process cannot be restricted by invocation of the clear and present danger doctrine or in any other manner. In *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 592 (1952) this Court stated:

> "Our Constitution sought to leave no excuse for violent attack on the status quo by providing a legal alternative—attack by ballot. To arm all men for orderly change, the Constitution put in their hands a right to influence the electorate by press, speech and assembly. This means freedom to advocate or promote Communism by means of the ballot box, but it does not include the practice or incitement of violence."

The most constitutional of ends in the exercise of First Amendment rights is the electoral process of popular election of representatives to the legislative body. To emasculate this right, as the State of Georgia has done by refusing to seat Appellant Bond, who has been twice duly elected by his constituents, is not only to deny the franchise right to the citizens of the 136th House District, but also to effectively deny them the politcal rights of the First Amendment.

This Court's description of the "right to exercise the franchise in a free and unimpaired manner" as "preservative of all rights", (*Reynolds* v. *Sims, supra,* at p. 562 of 377 U. S.; *Yick Wo* v. *Hopkins,* 118 U. S. 356, 370 (1886)), is another expression of the fact that impairment of the electoral processes transforms the great political freedoms of the First Amendment into a meaningless exercise. As stated in *Wesberry* v. *Sanders,* 376 U. S. 1, 17-18 (1964), the Georgia reapportionment case:

> "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we

must live. *Other rights, even the most basic, are illusory if the right to vote is undermined.*" (Emphasis supplied.)

By refusing to effectuate the constitutional end of the citizens of the 136th House District by banishing appellant Bond from the Georgia Legislature, the State has as effectively abridged and impaired the First Amendment rights of the citizens of the 136th District as if it had banned the newspapers, forbidden the speeches and outlawed the assemblies in favor of the election of appellant Bond. The conclusion necessarily follows that in excluding appellant Bond from his elected legislative office, the respondents, acting under State authority, have unconstitutionally violated and abridged the First Amendment rights of the citizens of appellant's legislative district.*

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* The interaction of representative government and the First Amendment freedoms has been considered by non-judicial authorities. The late Professor Alexander Meiklejohn wrote:

> ". . . the reason for . . . equality of status in the field of ideas lies deep in the very foundations of the self-governing process. When men govern themselves, it is they—and no one else—who must pass judgment upon unwisdom and unfairness and danger. And that means that unwise ideas must have a hearing as well as wise ones, unfair as well as fair, dangerous as well as safe, un-American as well as American. Just so far as at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good. *It is that mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed. The principle of the freedom of speech springs from the necessities of the program of self-government.* It is not a Law of Nature or of Reason in the abstract. *It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage.*" (Emphasis supplied.) Meiklejohn, Alexander, *Free Speech and Its Relation to Self-Government* (Harper & Bros. 1948), 25-7.

POINT II

The exclusion of appellant Bond from his elected office violated his rights of free speech guaranteed by the First and Fourteenth Amendments.

While the majority of the court below agreed that the separation of powers principle must, on the state level, give way to First Amendment rights, the court, nevertheless, proceeded to find that there was "room for a balance between the separation of powers principle, a system of federalism and individual rights afforded under the federal Constitution." To test the balance, the Court sought to determine whether appellant Bond had been denied due process of law.

This analysis is contrary to the view that the rights of free speech are accorded a constitutionally preferred position over other rights. *Thomas* v. *Collins*, 323 U. S. 516, 530 (1945); *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 639 (1943); *N.A.A.C.P.* v. *Button*, 371 U. S. 415, 433 (1963). As stated in *Sherbert* v. *Verner*, 374 U. S. 398, 406 (1963):

> "We must next consider whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of appellant's First Amendment right. It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation,' Thomas v. Collins, 323 U. S. 516, 530."

The application of a "rational evidentiary basis" to test whether a candidate's utterances on national (or local) issues disqualifies him to take the oath of office can only result in candidates cautiously "steer[ing] far wider of

the unlawful zone," *Speiser* v. *Randall*, 357 U. S. 513, 526 (1958) in their speeches and assemblies. The stultification of free debate and the tendency of the view in power to become the only expression on significant national and local issues are the by-products of the action of the Georgia House of Representatives upheld by the decision below. However, the First Amendment requires the opposite results; encouragement of debate and diversification of opinions are mandated by the Amendment. In *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 269 (1964) the Court declared:

> "The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' Roth v. United States, 354 U. S. 476, 484. . . . 'It is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions,' Bridges v. California, 314 U. S. 252, 270 . . . and this opportunity is to be afforded for 'vigorous advocacy' no less than 'abstract discussion'. N.A.A.C.P. v. Button, 371 U. S. 415, 429."

The exclusion of appellant Bond cannot be justified by the assertion that the determination of the qualifications of state legislators by their peers is too sensitive an area for federal intervention. No matter how appealing in other circumstances, the protective coating of local state interests cannot block federal intervention where First Amendment rights are at stake. *Cf. Dombrowski* v. *Pfister*, 380 U. S. 479, 486 (1965) (enjoining state criminal prosecutions). In the present case, the free speech rights of Mr. Bond are directly at stake in his exclusion from the Georgia House of Representatives.

Further, the restrictions on Mr. Bond's right to speak cannot be justified by the assertion that he sought to become a member of the House. It would seem self-obvious that, above all others, those who represent the people must have freedom to express their opinions. A knowledgeable electorate voting for persons whose views are known and on issues widely debated is a necessity of our democracy. *Cf. New York Times* v. *Sullivan, supra; Garrison* v. *Louisiana,* 379 U. S. 64 (1964). Appellant Bond's free speech is, therefore, subject to even greater protection from restriction precisely because he was the elected representative from his district. He cannot be barred from office for exercising his constitutionally protected right of free speech. "The fact that . . . a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution." *Torcaso* v. *Watkins,* 367 U. S. 488, 495-496 (1961).

CONCLUSION

The judgment of the United States District Court for the Northern District of Georgia should be reversed and the relief requested by Appellants granted.

Respectfully submitted,

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JUN 15 1966

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1965

No. 87

JULIAN BOND, DR. MARTIN LUTHER KING, JR., and MRS. AREL KEYES, for themselves jointly and severally, and for all others similarly situated,

Appellants,

v.

JAMES "SLOPPY" FLOYD, WILLIAM J. "BILL" LEE, ED T. FULFORD, J. TERRELL WEBB, W. JONES LANE, DAVID L. NEWTON, ETC. and GEORGE T. SMITH, ETC.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA (ATLANTA DIVISION)

APPELLANTS' MEMORANDUM

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IN THE

Supreme Court of the United States

October Term, 1965

No. 1125

JULIAN BOND, DR. MARTIN LUTHER KING, JR., and MRS. AREL KEYES, for themselves jointly and severally, and for all others similarly situated,

Appellants,

v.

JAMES "SLOPPY" FLOYD, WILLIAM J. "BILL" LEE, ED T. FULFORD, J. TERRELL WEBB, W. JONES LANE, DAVID L. NEWTON, ETC. and GEORGE T. SMITH, ETC.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA (ATLANTA DIVISION)

APPELLANTS' MEMORANDUM

There was a suggestion in respondents' memorandum that the legislative committee might moot the controversy by seating the appellant, Julian Bond, after he had won a second election. Appellants have previously indicated their view that the controversy could not be mooted even under such circumstances. But even that possibility is now eliminated by the committee's decision of May 23, 1966 that seating be again denied Mr. Bond; a copy is annexed hereto as Appendix A. This decision was made after a hearing in which the issue was directly posed to Mr. Bond, *viz.*, would he recede from his earlier position which had

led to the pending litigation? Mr. Bond explicitly reaffirmed his position.

Appellants had not previously thought it necessary to advise the Court of this decision since their appeal is predicated upon the first election herein. However, since the Term is drawing to a close, it has been deemed appropriate to call this matter to the attention of the Court.

Appellants respectfully ask the Court to note probable jurisdiction before the close of this Term so that they can proceed expeditiously with their appeal and to grant the motion to advance so as to avoid any future question of mootness.

Respectfully submitted,

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June 14, 1966

Appendix A

In regard: W. Jones Lane and William Burton Steis, Protestants, versus Representative-Elect Julian Bond, Respondent.

The matter of contests filed to the seating of Representative-Elect Julian Bond pursuant to his election at a special election held on February 23, 1966, coming on regularly for hearing before the standing Rules Committee of the House of Representatives at 10:35 A.M. on May 23, 1966, at the State Capitol in Atlanta, Georgia, after hearing evidence, receiving Exhibits, and hearing remarks of counsel; it is the unanimous finding of the Committee that the seating of Representative-Elect Julian Bond in the House of Representatives of the General Assembly of the State of Georgia as a member from District 136 be denied and that this action be filed with the Clerk of the House pursuant to Rule 258 of the House of Representatives.

This 23rd day of May, 1966.

GEO. G. SMITH,
Chairman.

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IN THE

Supreme Court of the United States

October Term, 1966

No. 87

JULIAN BOND, ET AL.,

Appellants,

v.

JAMES "SLOPPY" FLOYD, ET AL.,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA (ATLANTA DIVISION)

BRIEF FOR THE APPELLANTS

Opinions Below

The opinions below (R. 132, 154) are reported at 251 F. Supp. 333 (N. D. Ga. 1966).

Jurisdiction

The judgment below (R. 178) was entered on February 16, 1966. Appellant filed a notice of appeal in the court below on the same day (R. 180).

The District Court had jurisdiction under 28 U. S. C. §§ 1331, 1343, subds. 3 and 4, 2201 and 2281, and under 42 U. S. C. §§ 1971, 1983 and 1988. The appellees moved to dismiss the appeal or to affirm the judgment below. On June 20, 1966, the Court noted probable jurisdiction (R. 186).

Questions Presented

1. Did the Georgia House of Representatives exceed its authority under the Georgia Constitution in excluding Mr. Bond from his elected office as representative to the House solely because of the opinions he expressed on issues of national concern.

2. Are the provisions of the Georgia Constitution, as interpreted by the court below, unconstitutionally vague under the Fourteenth Amendment.

3. Did the exclusion of Mr. Bond from legislative office solely because of the opinions he expressed impair freedom of opinion and speech as well as his privileges and immunities under the First and Fourteenth Amendments.

4. Did his exclusion from office disenfranchise Mr. Bond's constituents in violation of the due process and equal protection clauses of the Fourteenth Amendment.

5. Does House Resolution 19 disqualifying Mr. Bond from his elected office constitute an *ex post facto* law or a bill of attainder in violation of Article I, Section 10 of the United States Constitution.

Constitution and Legislative Acts Involved

The provisions of the Georgia Constitution involved in this case are as follows:

> Article III, Section VII, Paragraph I (§ 2-1901, Ga. Code Ann.), making the House "the judge of the election, returns, and qualifications of its members", *infra*, p. 47.
>
> Article III, Section VI, Paragraph I (§ 2-1801, Ga. Code Ann.), setting forth the members' qualifications, *infra*, p. 47.

Article III, Section IV, Paragraph V (§ 2-1605, Ga. Code Ann.), specifying the oath of office of representatives, *infra*, p. 47.

The following provisions of the Georgia Constitution setting forth the disqualifications for office are also involved in this case:

Article II, Section II, Paragraph I (§ 2-801, Ga. Code Ann.), *infra*, p. 48.

Article III, Section IV, Paragraph VI (§ 2-1606, Ga. Code Ann.), *infra*, p. 48.

Article VII, Section III, Paragraph VI (§ 2-5606, Ga. Code Ann.), *infra*, p. 49.

The legislative actions involved in this case are as follows:

House Rule 61 of the Georgia House of Representatives adopting the provisions of Article III, Section VII of the Georgia Constitution, *infra*, p. 49.

House Resolution 19 of January 10, 1966, excluding Mr. Bond from office, *infra*, pp. 49, 50.

Statement of the Case

This case arises from the refusal of the Georgia House of Representatives to seat the appellant Julian Bond, the duly elected Representative from the 136th House District, Atlanta, Fulton County, Georgia. The events which led to his exclusion from the Georgia House are as follows:

A. How Mr. Bond Acquired the Right to be Sworn and Seated as a Member of the Georgia House of Representatives

The United States District Court for the Northern District of Georgia in *Toombs* v. *Fortson*, 241 F. Supp. 65

(N.D. Ga. 1965), ordered the Georgia House of Representatives reapportioned on the basis of population. As a result, Fulton County, Georgia, gained 21 seats in addition to the three seats it already held, making a total of 24 Representatives from that county, one for each of the 21 newly created House Districts and three Representatives at large. Pursuant to legislation enacted in compliance with the order in *Toombs* v. *Fortson, supra*, House District 136 was created and a primary election was held on May 5, 1965 to nominate a candidate for this office (R. 4, 105). Appellant Bond, a 25-year-old Negro pacifist and communications director of the Student Nonviolent Coordinating Committee (hereinafter SNCC) entered and won the Democratic nomination. He received 1,243 votes, and the Rev. Howard Creecy Sr., his opponent, a Negro also, 522 votes (R. 4, 105, 106).

In the general election held on June 15, 1965, appellant Bond defeated his Republican opponent, Malcom J. Dean, Dean of Men at Atlanta University and a Negro, by a vote of 2,320 to 487 (R. 4, 106). Eighty-two per cent of the eligible voters voted, more than in any other House District (R. 106). House District 136 is predominantly Negro. Of the 6,500 voters, 6,000 are Negroes (R. 4, 106).

Appellant Mrs. Arel Keyes voted for Julian Bond in both the primary and in the general election. Appellant Dr. Martin Luther King, Jr., Nobel Peace Prize laureate and noted civil rights leader, is a resident of House District 136 (R. 4, 120).

B. Events of January 6, 1966 Giving Rise to the Demand to Exclude Mr. Bond

On January 6, 1966 SNCC issued a statement to the press critical of American policy with respect to Viet Nam and with respect to equal rights for Negroes within the United States (R. 135, 136). The statement placed

responsibility for the murder of Samuel Young [1] in Tuskegee, Alabama, upon the federal government and equated the failure of the Administration to protect Samuel Young with the death of Vietnamese peasants emanating from an aggressive foreign policy conducted in violation of international law (R. 136, 137). SNCC charged the United States with deception in its concern for freedom for the Vietnamese people and for the freedom of colored people in the Dominican Republic, Africa, and in the United States (R. 136, 137).

Scoring the unpunished acts of violence and false imprisonment to which its members and others engaged in the struggle for equal rights in the South had been subjected, the SNCC statement questioned both the ability and the desire of the federal government to guarantee free elections abroad and labeled declarations to "preserve freedom in the world", a hypocritical mask behind which the United States suppresses liberation movements (R. 137).

The statement expressed SNCC's support for men in this country unwilling to respond to a military draft. SNCC questioned, "where is the draft for the freedom fight in the United States?" (R. 137). The statement, after noting the disproportionate number of Negroes serving in Viet Nam, concluded:

> "We therefore encourage those Americans who prefer to use their energy in building democratic forms within this country. We believe that work in the civil rights movement and with other human relations organizations is a valid alternative to the draft. We urge all Americans to seek this alterna-

[1] Samuel Young, a SNCC worker, was a Navy veteran. He lost one of his kidneys from a wound he had received in the ill-fated Bay of Pigs invasion of 1961 off the coast of Cuba. Young was shot and killed in January, 1966 near a gasoline service station in Macon County, Alabama as he approached the station to use the rest-room. New York Times, Jan. 5, 1966, p. 1, col. 2.

tive, knowing full well that it may cost their lives—as painfully as in Viet Nam." (R. 137).

Later in the afternoon, a newsman employed by a state-owned radio station called Julian Bond, who had not participated in drafting the statement, at his residence in Atlanta and inquired whether Bond endorsed the SNCC statement (R. 36, 45, 48). Bond said that he did, adding that as a pacifist he opposed all wars and was "eager and anxious to encourage people not to participate in it [war] for any reason that they choose" (R. 111). He further stated that he agreed with the statement for the reasons set forth because he thought it was "sorta hypocritical for us to maintain that we are fighting for liberty in other places and we are not guaranteeing liberty to citizens inside the continental United States" (R. 111). He saw no conflict between his endorsement of the SNCC statement and the performance of his duties as a legislator or his ability to take the oath of office (R. 111).

C. Proceedings in the House of Representatives to Exclude Mr. Bond

On the morning of January 10, 1966, when Mr. Bond arrived at the House of Representatives to be sworn in as the Representative-elect from the 136th House District, the Clerk of the House ordered him to stand aside as the oath was administered to the other Representatives. Challenges to Mr. Bond's right to be sworn and seated, based upon his statement to the press, were filed by at least 75 white members of the House. The petitions charged, *inter alia*, that Mr. Bond's actions and statement gave aid and comfort to the enemies of the United States, violated the Selective Service laws, and tended to bring discredit and disrespect on the House of Representatives (R. 13-15); that he had stated that he "admires the courage of those persons who burn their draft cards" (R. 13). It was also charged that the statements and views of Mr. Bond disqualified him

from taking the oath to support the Constitution of the United States and the Constitution of Georgia required of a member of the House of Representatives (R. 14, 18, 19). The petition charged that Mr. Bond's "full endorsement" of the SNCC policy statement "is totally and completely repugnant to and inconsistent with the mandatory oath prescribed" for members (R. 19).

Mr. Bond filed a written response to the challenge petitions, denying that he was disloyal, disqualified, or that he had committed treason, or violated any law. His response alleged, *inter alia*, that the challenges, contests and petitions were filed against him to deprive him of his rights under the First Amendment (R. 21).

A Special Committee composed of the Rules Committtee and three additional members, two of whom were Negroes, was appointed to hear the challenge. Three of the persons challenging Mr. Bond's right to be seated served on the Special Committee (R. 9).

A hearing was then held on the challenge petitions for the purpose of deciding "the substance of what Mr. Bond said" before offering himself for membership in the House, "and the intentions behind what he said" (R. 29). For evidence, the challengers introduced a tape of the telephonic interview on January 6, 1966, a tape of an interview with Mr. Bond in the hallway of the State Capitol immediately after the Clerk refused to administer the oath to him (R. 115), and the testimony of Mr. Bond (R. 81). Mr. Bond was asked at the hearing whether he admired "the courage of persons who burn their draft cards" (R. 40). He replied:

> "I admire people who take an action, and I admire people who feel strongly enough about their convictions to take an action like that knowing the consequences that they will face, and that was my original statement when asked the question." (R. 41).

Mr. Bond called four witnesses who urged his seating and stated that he deserved the right to be seated (R. 58, 61, 65, 69).

The Special Committee then recommended that Mr. Bond not be seated (R. 88). The two Negro members dissented along with a white legislator from Fulton County (R. 89, 92). The House then adopted House Resolution 19 not to seat Mr. Bond in accordance with the majority recommendation of the Special Committee (R. 99).

D. Proceedings in the Court Below to Remedy the Exclusion

Mr. Bond and his constituents thereupon instituted this action for injunctive relief and a declaratory judgment that the legislature's action was unauthorized by the state Constitution and violated their rights under the federal Constitution. A three-judge court was convened under 28 U. S. C. § 2281, and conducted a trial of the issues.[2]

On February 14, 1966, the Court rendered final judgment against the appellants. It unanimously held that it had jurisdiction because the plaintiffs had asserted substantial First Amendment rights (R. 140). The Court, Chief Judge Tuttle dissenting, struck from the complaint the names of the appellants other than Mr. Bond on the ground that they lacked "such a direct interest in the litigation as would give them standing to bring the complaint" (R. 141).

On the merits, the Court was also divided. The majority agreed that "[t]he substantial issue in the case rests on the guaranty of freedom of speech or to dissent, under the First Amendment as the amendment has long been applicable to the states under the due process clause of the Fourteenth Amendment" (R. 142). Nevertheless, it held that Mr. Bond's "statements and affirmation of the SNCC state-

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[2] At the trial, in order to avoid adding the State Treasurer as a party defendant, the parties stipulated that the State of Georgia would pay Mr. Bond's legislative salary should he prevail upon this appeal (R. 185).

ment as they bore on the functioning of the Selective Service System could reasonably be said to be inconsistent with and repugnant to the oath which he was required to take" (R. 153).

Chief Judge Tuttle, dissenting, was of the view that since substantial federal constitutional issues of freedom of speech were involved, the Court was under a duty to construe the Georgia constitutional provisions "with an eye to the avoiding of the constitutional question if possible" (R. 166). He concluded that Mr. Bond had met the qualifications for legislative office explicitly set forth in the Constitution and that it could not be construed to authorize rejection from elected office for a reason not specified, *viz.*, for making a lawful public statement upon foreign affairs.

E. Subsequent Actions by the Electorate

While this appeal was pending the Governor of Georgia called a special election to fill the vacancy created by Mr. Bond's exclusion. Mr. Bond entered the election on protest and won it on February 23, 1966. He was again prevented from taking his seat by a decision of the Rules Committee authorized by the House to act during the legislative recess. The decision was made after a hearing in which he declined to recede from the earlier position which had led to this litigation.[3] On September 14, 1966, Mr. Bond again won the Democratic primary and will be the Democratic candidate in the November 1966 election.

Summary of Argument

I

In excluding Mr. Bond from the office to which he had been elected, the Georgia House exceeded its authority

[3] See appellees' motion to affirm or dismiss, appellants' brief in opposition and motion to advance, and appellants' memorandum of June 14, 1966.

under the clear language of the Georgia Constitution. This conclusion is further supported by the lessons of Anglo-American history, by Georgia case law, and by the need to avoid the substantial constitutional problems otherwise presented by this case.

The Georgia Constitution is explicit on the subject of the qualifications and disabilities for office in the House. Article III, Section VI, Paragraph I sets forth the qualifications, *infra*, p. 47. Three succeeding articles set forth in precise terms the reasons for disqualifications or ineligibility, *infra*, pp. 48, 49. The court below agreed that Mr. Bond met these constitutional requirements. The case does not present the different and broader power of the House to punish its members "for disorderly behavior or misconduct," *infra*, p. 49.

The constitutional provision that the House "be the judge of the election returns, and qualifications of its members" authorizes it to determine whether the constitutional qualifications have been met, not to add new ones. This view is epitomized by the Middlesex election case of John Wilkes, *infra*, p. 19 which was reflected in the language of the federal Constitution and in many of the succeeding state constitutions prescribing qualifications for legislative office.

The oath required of a legislator that he will support the federal and state Constitutions, and will "so conduct myself, as will, in my judgment, be most conducive to the interests and prosperity of this State", *infra*, p. 47 does not authorize the House to impose additional qualifications. Such a construction of the oath is a distortion of language raising serious constitutional problems of vagueness, impairment of freedom of speech, denial of the franchise, and gives rise as here to a bill of attainder and an *ex post facto* law. It also violates the salutary rule that courts should, if possible, seek a construction which would avoid constitutional problems.

II

There is nothing vague about the provisions of the Georgia Constitution which explicitly set forth both the qualifications and disqualifications of members of the legislature. However, the finding below in the constitutional requirement of an oath of office, Article III, Section IV, Paragraph V, of an implicit substantive qualification for office makes the oath unconstitutionally vague. In terms, the oath is a promise that its taker will support the federal and state Constitutions and conduct himself in his judgment in the state's best interests. The court below has changed this promissory oath into a representation as to the past, giving a legislative majority the authority to determine whether the oath can be sincerely taken. The required assessment of the legislator's past behavior, statements and opinions finds no standard in an oath as to what is "most conducive to the interests and prosperity of this State . . ." in his judgment. Such an oath is unconstitutionally vague under this Court's decisions in *Cramp* v. *Board of Public Instruction,* 368 U. S. 278 and *Baggett* v. *Bullitt,* 377 U. S. 360. The vice of vagueness is aggravated since the oath as applied admittedly touches upon sensitive First Amendment freedoms.

III

It is not disputed that Mr. Bond was excluded from office solely because of his opinions and statements on national issues. This exclusion strikes at the "national commitment" for debate on public issues embodied in the First Amendment. It does violence to the guarantee in the privileges and immunities clause of the right to assemble, debate and petition on issues affecting the federal government. An elected legislator has as much right as his constituents under the First Amendment to have these beliefs and to state his opinion on the subject. Indeed, he has a special duty to state his views to his constituents who

are entiled to have a basis for evaluating him. He also carries out his responsibilities by expressing their views.

Neither the principle of separation of powers nor that of federalism justifies a diminution of First Amendment protections. It is a judicial function to restrain illegal action by the other branches of government, and the federal courts have the responsibility of protecting federal constitutional rights against state action. The test applied below of a "rational evidentiary basis" has been held to be appropriate in cases of economic regulation, not where First Amendment freedoms are involved. An elected representative has an absolute right to express his opinions on public issues without being declared ineligible for office.

But even under the lower court's own test, there was no rational basis for believing that Mr. Bond's statements "could reasonably be said to be inconsistent with and repugnant to the oath which he was required to take." The SNCC statement which he endorsed was a vigorous expression of opinion on national affairs and protected by the First Amendment. Mr. Bond's approval of it and his admiration for the courage of persons who were prepared to act in accordance with their conscience was not inconsistent with his oath of office. There was no substantive state interest here comparable to those found in cases involving conspiracies to overthrow the government, obscenity and disorderly conduct in the street. The state has no legitimate interest in the suppression of dissenting views in its legislature; indeed, the policy of Georgia, constitutionally established, is not to disqualify legislators even for criminal conduct until after a judgment of criminal conviction. The very subject under discussion, national conscription for military service, is beyond state jurisdiction. *Pennsylvania* v. *Nelson*, 350 U. S. 497. But there is a real state interest inherent in a democracy in the expression of dissenting views by the members of the Legislature, and in obedience to the choice of the electorate.

IV

Mr. Bond's constituents have been deprived of representation in the House. Mrs. Keyes' right to cast a meaningful vote and Dr. King's right to be represented are as important as Mr. Bond's right to take office. To deprive them of these rights because the legislature disapproved of Mr. Bond's political views is to violate the due process and the equal protection clauses of the Fourteenth Amendment. The court below was therefore in error in holding that they lacked a direct interest in the litigation.

V

House Resolution 19 is a bill of attainder under the tests established by history and by this Court and violates Article I, Section 10 of the United States Constitution. It named Mr. Bond as the object of the resolution and it punished him for his expressions of political opinion. The House Resolution is also an *ex post facto* law, violative of the same constitutional provisions. The Georgia Constitution afforded no notice that a legislator's opinions and public statements would disqualify him from office. It is an *ex post facto* law because it is punishment for acts innocent at the time of occurrence.

ARGUMENT

POINT I

The House did not have power under Georgia law to bar Mr. Bond from office.

Chief Judge Tuttle, dissenting below, correctly stated that "the House exceeded its authority [under the Constitution and laws of Georgia] in voting to reject Bond" (R. 154, 176). This conclusion was required by the clear

language of the Georgia Constitution, the absence of conflicting state court decisions, and the need to avoid the substantial constitutional problems otherwise presented by this case.

The Georgia Constitution is explicit on the subject of the qualifications of and the disabilities for office in the House of Representatives.

Article III, Section VI, Paragraph I provides:

> "Qualifications of representatives.—The Representatives shall be citizens of the United States who have attained the age of twenty-one years, and who shall have been citizens of this State for two years, and for one year residents of the counties from which elected." (§ 2-1801, Ga. Code Ann.)

The disqualifications appear in three other provisions of the same Constitution.

Article II, Section II, Paragraph I, entitled "Registration of electors; who disfranchised", provides that:

> "* * * the following classes of persons shall not be permitted to register, vote, or hold any office, or appointment of honor, or trust in this State, to-wit: 1st. Those who shall have been convicted in any court of competent jurisdiction of treason against the State, of embezzlement of public funds, malfeasance in office, bribery or larcency, or of any crime involving moral turpitude, punishable by the laws of this State with imprisonment in the penitentiary, unless such persons shall have been pardoned. 2nd. Idiots and insane persons." (§ 2-801, Ga. Code Ann.)

Article III, Section IV, Paragraph VI, entitled "Eligibility; appointments forbidden", denies a seat in either House to persons "holding a military commission, or other appointment, or office having an emolument, or compensation annexed thereto, under this State, or the United States" (with certain exceptions) and to "any defaulter for public money, or for any legal taxes". (§ 2-1606, Ga. Code Ann.)

Article VII, Section III, Paragraph VI, entitled "Profit on public money", makes it "a felony, and punishable as may be prescribed by law, a part of which punishment shall be disqualifications from holding office" for a member of the General Assembly to receive "any interest, profits or perquisites, arising from the use or loan of public funds in his hands or moneys to be raised through his agency for State or county purposes." (§ 2-5606, Ga. Code Ann.)

The precision of these qualifications stands out in contrast to the broader power of the House to punish its members "for disorderly behavior, or misconduct, by censure, fine, imprisonment, or expulsion" Article III Section VII Paragraph I (§ 2-1901, Ga. Code Ann.). The breadth of this latter power is appropriately balanced in the Georgia Constitution as in most others by the requirement that "no member shall be expelled except by a vote of two-thirds of the House to which he belongs", *ibid.*

The majority below did not disagree with the Chief Judge's view that Mr. Bond could not be excluded under any specific provision of the Georgia Constitution. Instead, it denied that the "qualifications and disqualifications of legislators in the Georgia Constitution are all-inclusive" (R. 148), and it found in the principle of separation of powers an *implied* right in the Georgia House to reject the majority choice of the voters. It said that the Chief Judge's "restrictive" view was "unfounded in recognized authority and not in keeping with our history or the principle of separation of powers" (R. 144).

It is not clear from the decision below which of the authorities and facts it sets forth was intended to be covered by the terms "authority", "history" and "separation of powers". Regardless of how they are categorized, they do not support the conclusion of the court below.

Every Georgia Constitution, including the first Constitution of 1777, has specified the qualifications of representa-

tives.[4] The frequent changes which have been made in these qualifications suggest that close attention has been paid to the problem, and that the drafters of the Constitutions have always sought to make the qualifications explicit and to keep them politically meaningful. There is no indication in the journals or reports of the conventions[5] or in the scholarly discussions of Georgia constitutional law[6] that qualifications for legislative office existed outside those specified in the Constitution.

No state court in Georgia has ever held that the House has the power to impose qualifications. The Supreme Court of Georgia held directly to the contrary in 1869 when the results of an election for Clerk of the Superior Court were challenged on the ground that the victor had "one-eighth or more of African blood" and hence was ineligible under the Georgia code. In *White* v. *Clements*, 39 Ga. 232, 265, the court definitively held that "if the Constitution prescribes a qualification for an officer, it by necessary implications denies to the legislature the power to fix new and other qualifications."

The court below cited three Georgia state cases for the proposition that its courts "have consistently refused to take jurisdiction over controversies having to do with qualifications of legislators. The Senate or House, as happened to be the case, was deemed to have exclusive juris-

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[4] The constitutions are cited at R. 143.

[5] See, *e.g.*, Journal of the Georgia Constitutional Convention, January 4, 1789, May 4, 1789; *Journal of the Georgia Constitutional Convention of 1798*, ed. Saye, 36 The Georgia Historical Quarterly, No. 4, Dec. 1952, 350, 356, 365; A Stenographic Report of the Proceedings of the Georgia Constitutional Convention, 1877, 374.

[6] See McElreath, *A Treatise on the Constitution of Georgia* (1912); Saye, *A Constitutional History of Georgia* (1948); Ware, *A Constitutional History of Georgia* (1947).

diction under the Georgia Constitution. *Rainey* v. *Taylor*, 1928, 166 Ga. 476, 143 S. E. 383; *Fowler* v. *Bostick*, 1959, 99 Ga. App. 428, 108 S. E. 2d 720; and *Beatty* v. *Myrick*, 1963, 218 Ga. 629, 129 S. E. 2d 764" (R. 143-144). None of those cases, as Chief Judge Tuttle pointed out, gives the House or Senate jurisdiction "to judge whether the contesting parties lacked qualifications *which are not expressly stated as 'qualifications' or rules of 'eligibility' in the Georgia Constitution*" (R. 167). In *Rainey*, the General Assembly was held solely authorized to determine whether the successful candidate was disqualified under a constitutional prohibition against one holding another state office. In *Fowler*, the same issue was raised with respect to the position of court clerk. *Beatty* involved not qualifications but the judging of the election results.

Those cases were correctly decided under the constitutional provision that "each House shall be the judge of the election, returns and qualifications of its members . . .", Article III, Section VII, Paragraph I (§ 2-1901, Ga. Code Ann.). That provision does not authorize the House to establish qualifications other than those set forth in the Constitution, nor did the court below so hold. It means that the House is to determine whether the members meet the qualifications specified by law.

The lower court's statement that "there is at least one disqualification in the Georgia law which is not contained in the Constitution" (R. 147) is not apposite. It is not clear that the statute making "persons of unsound mind" ineligible for "civil office" refers to the legislature (Ga. Code Ann. §§ 89-101 subd. 5), *cf.* 17 Op. Atty. Gen. (U. S.) 420 (1882) interpreting Art. 2, Section 4 of the United States Constitution; if so, it would violate the Georgia Constitution, *White* v. *Clements*, *supra*. In any event, the establishment of qualifications by statute is very different from a House Resolution adopted pursuant to quasi-judicial powers.

Chief Judge Tuttle's conclusion that the qualifications must be specified by law, not promulgated on an *ad hoc* basis, is supported by the 18th century parliamentary history of England and by the debates and actions of the Federal Constitutional Convention of 1787. The former is important because of the close relationship between John Wilkes and the Revolutionists, the latter because the United States Constitution was followed by the Georgia Constitution which like it made the qualifications for legislative office quite specific.

Significant English history on this point goes back to *Ashby* v. *White* (1702), 2 Ld. Raym. 938, 14 S. T. 695, where Chief Justice Holt, dissenting, expressed the view that "since the privileges of Parliament were a part of the law, they must be defined by the law, and not by the resolutions of the House". 10 Holdsworth, *History of English Law*, 543.[7] As Mr. Justice Frankfurther has said, "The House of Commons' claim of power to establish the limits of its privilege has been little more than a pretense since *Ashby* v. *White*, 2 Ld. Raym. 938, 3 id. 320", *Tenney* v. *Brandhove*, 341 U. S. 367, 376-377.[8]

The principle was established most dramatically by the Middlesex election case of John Wilkes[9] who is known in Anglo-American constitutional history for more than his successful assault upon general warrants employed to ferret out opposition to the Crown,[10] or legislative im-

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[7] Holt's opinion was adopted by the House of Lords. See, H. L. Jour. XVII, 534 (1704); Williams, *The Eighteenth Century Constitution* (1960) 221, 224-228.

[8] *Ashby* is also cited in *Gray* v. *Sanders*, 372 U. S. 368, 375, n. 7.

[9] The Middlesex election case is described at length in May, *Constitutional History of England*, I, 364-384; Chafee, *Free Speech in the United States* (1964) 242-247; 10 Holdsworth, *History of English Law*, 540-549; Williams, *The Eighteenth Century Constitution* (1960), 222-223, which includes significant parliamentary resolutions on the subject, *id.* at 242-244.

[10] Chafee, *op. cit.* 242.

munity from arrest [11] or his insistence upon the reporting of parliamentary debates.[12]

Wilkes was elected to the House of Commons as a member for the County of Middlesex in 1768 and was expelled from it on account of "seditious libel", *viz.*, his attack upon George III. He was re-elected, re-expelled and declared incapable of being elected to serve in that Parliament. On his third re-election the House declared his opponent to have been elected. "The crux of the matter was whether the House had power to incapacitate Wilkes from being elected." [13] This issue was bitterly contested in England, with financial and other support from the American colonists, whose cause was identified with that of Wilkes.[14] It was recognized in both countries that the right of the people to choose their representatives was at stake. Thus, in the House of Commons serjeant Glyn stated:[15]

> "The disqualification of Mr. Wilkes not being the law of the land, the freeholders of Middlesex were not obliged to take notice of it. That the disqualifications of bodies of men, as clergy, aliens, etc., were all either by express laws, or by implication from the common law, and that the votes of the House to that effect were only declaratory, but not enacting. That undoubtedly the House had a jurisdiction over its own members, and were judges of the rights of electors, but such judgments must be according to law, a natural consequence of every

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[11] *Ibid.*

[12] E. N. Williams, *op. cit.* 223.

[13] *Ibid.*

[14] Miller, *Origins of the American Revolution* (1943) 201, 305, 317, 321-325, 425, Rudé, *Wilkes and Liberty*; Beloff, *The Debate on the American Revolution, 1761-1783* (2d ed. 1960) 21, 27; Postgate, *That Devil Wilkes* (1930) 150, 186, 234-235; Schlesinger, *Prelude to Independence* (Vintage ed 1965) 35-37 and *passim.*

[15] Parl. Hist. Vol. XVI, 587 in; Holdsworth, *op. cit.* at 543.

> court of judicature in this kingdom. That the rights of the freeholders of Middlesex, as well as the right of every citizen or burgess, was an inherent right in them, not derived from the House of Commons, and therefore could not be taken away from them by the House, except in cases when, offending against law, they had forfeited a right to such privileges."[16]

In 1782 the House of Commons expunged the prior exclusions "as being subversive of the Rights of the whole Body of Electors of this Kingdom".[17] Since then it has been established law in England that there may be no disqualification for office except for reasons established by law, see Erskine May's *Treatise on the Law, Privileges and Proceedings and Usage of Parliament* (17th ed. 1964) 60-63.

It was quite natural that the draftsmen of the various American Constitutions should take pains to ensure that the legislative bodies be selected by the people in accordance with prescribed conditions of office. Thus, on the floor of the Constitutional Convention of 1787 James Madison successfully led the opposition to a proposal "to give to Congress power to establish qualifications in general . . . and it also defeated the proposal for a property qualification. . . ." Warren, *The Making of the Constitution* (1928), 420-422. As the Journal of the Federal Convention of 1787 states:

> "Mr. Madison was opposed to the Section as vesting an improper and dangerous power in the Legislature. The qualifications of electors and elected were fundamental articles in a Republican Govt. and ought to be fixed by the Constitution. If the Legislature could regulate those of either, it can by degrees subvert the Constitution. A Republic may be converted into an aristocracy or oligarchy

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[16] See also Parl. Hist. Vol. XVII, 131-134.

[17] H. C. Jour. XXXVIII, 977 (May 3, 1782); William, op. cit., 244.

> as well by limiting the number capable of being elected, as the number authorised to elect. In all cases where the representatives of the people will have a personal interest distinct from that of their Constituents, there was the same reason for being jealous of them, as there was for relying on them with full confidence, when they had a common interest. This was one of the former cases. It was as improper as to allow them to fix their own wages, or their own privileges. It was a power also which might be made subservient to the views of one faction agst. another. Qualifications founded on artificial distinctions may be devised, by the stronger in order to keep out partizans of a weaker faction.
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> Mr. Madison observed that the British Parliament possessed the power of regulating the qualifications both of the electors, and the elected; and the abuse they had made of it was a lesson worthy of our attention. They had made the changes in both cases subservient to their own views, or to the views of political or Religious parties." 2 Farrand, *The Records in the Federal Convention of 1787* (Aug. 10, 1787), pp. 249-50.

Authoritative contemporary discussion was to the same effect. Alexander Hamilton wrote:

> "The qualifications of the persons who may choose or be chosen . . . are defined and fixed by the constitution; and are unalterable by the legislature." The Federalist, No. 60 (Cooke ed. 1961) 409.

And Mr. Justice Story wrote:

> "It would seem but fair reasoning, upon the plainest principles of interpretation, that when the Constitution established certain qualifications as necessary for office, it meant to exclude all others as requisites. From the very nature of such a provision, the affirmation of these qualifications would seem to imply a negative of all others." *Story on the Constitution*, § 625 (6th ed. 1891) 461.

Mr. Warren is correct in concluding that, "The elimination of all power in Congress to fix qualifications clearly

left the provisions of the Constitution itself as the sole source of qualifications", Warren, op cit. at 422.[18]

Significantly, a constitutional amendment was apparently deemed necessary to exclude persons from Congress who, contrary to their oath, had "engaged in insurrection or rebellion" or "given aid or comfort to the enemies" of the United States (Const., Amendment XIV, § 3).

It is reasonable to assume that the views of the delegates to the Federal Constitutional Convention were known and accepted in Georgia. John Wilkes was strongly supported in Georgia as elsewhere in the United States.[19] The Georgia Convention of May 1789 adopted the state's second Constitution, some 16 months after Georgia had ratified the federal Constitution, containing language similar to that in the federal Constitution.[20]

The plain language of the Georgia Constitution, reinforced by English and American constitutional history is not refuted by the occasional partisan claims in Congress to a greater power over qualifications. This is very different from the administrative implementation of a statute in which Congress by failing to amend is deemed to acquiesce. *Cf. United States* v. *Midwest Oil Co.*, 236 U. S. 459. For every claim of a legislative body's power to fix qualifications there is an equally firm claim to the contrary

[18] The same conclusion was reached after a detailed study of the convention proceedings. Note, *The Right of Congress to Exclude its Members*, 33 Va. L. Rev. 322 (1947). Another commentator relied upon by the court below concerning Congressional practice (R. 146-47) agrees that "neither House may impose qualifications additional to those that are mentioned" I Willoughby, *The Constitution of the United States* (2d ed. 1929) § 340.

[19] See, *e.g.*, McCall, *History of Georgia* (1816) II, 299-300.

[20] Georgia's first Constitution, that of 1777, contained a statement of qualifications. Its second, that of 1789, was the first to authorize the legislature to judge the "election, returns and qualifications" of members.

and inconsistency of position by the most judicious of Senators is not unknown.[21] It is more significant that on a subject so fraught with politics the attempt to impose extra-constitutional qualifications has been so rarely asserted.

The "historical precedents" cited by the court below are illusory (R. 146). The Senate never decided the case of Senator Bilbo who died before action could be taken. The principal charge against him related to his conduct of his election campaign, a legitimate subject of inquiry (see *Senate Election, Expulsion and Censure Cases from 1789 to 1960*, S. Doc. No. 71, 87th Cong. 2d Sess., 142-143). As for Senator Smoot, the Senate refused to exclude him "for alleged disqualifications other than those specified in the Constitution", *id.* at 97-98; even the attempt to expel him failed.

The federal cases relied upon by the majority below are equally inapposite (R. 145-148). Two of them, *In re Chapman*, 166 U. S. 661, and *Barry* v. *United States*, 279 U. S. 597, involve the federal power of investigation. *Wilson* v. *North Carolina*, 169 U. S. 586, involved a state governor's suspension of a state commissioner. *Snowden* v. *Hughes*, 321 U. S. 1, did not involve a legislative imposition of new qualifications, but a challenge of election results.[22]

The court below finally sought to find in the "oath of members" provision of the Constitution (Article III, Section IV, Paragraph V) some authority for the action of the House:

> "Each senator and representative, before taking his seat, shall take the following oath, or affirmation,

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[21] See, for example, the views of Senators Taft and George on the qualifications of Senator Langer, 88 Cong. Rec. 2859 (1942) and Senator Bilbo, (93 Cong. Rec. 15, 16).

[22] The single state court case cited by the majority was *Hiss* v. *Bartlett*, 3 Gray 468 (1855), a case involving the broader right of expulsion (R. 145).

> to wit: 'I will support the Constitution of this State and of the United States, and on all questions and measures which may come before me, I will so conduct myself, as will, in my judgment, be most conducive to the interests and prosperity of this State'." (§ 2-1605, Ga. Code Ann.)

Nothing in this oath authorizes the House to bar from office a person who meets the qualifications of Article III, Section VI, Paragraph I of the Constitution, and who is not disqualified by the explicit provisions for disqualification. The Constitution requires an elected member to take the oath before he takes his seat; it does not authorize his fellow members to prevent him from taking the oath, which is promissory in character and not a standard for judging past conduct. There is nothing more subjective and hence incapable of use as a test of qualifications than the agreement that the oath-taker will support the state and federal Constitutions and that he will conduct himself as will in his judgment "be most conducive to the interests and prosperity of this State."

The determination of loyalty is not to be found in the manipulation of this oath of office. The state Constitution has made explicit provision elsewhere for such a determination which disqualifies persons "convicted in any court of competent jurisdiction of treason against the state," Article II, Section II, Paragraph I, *infra*, p. 48.

The attempt to turn the oath provision, a solemn appeal to the conscience of a member, into a qualification for office is a plain distortion of language and of the purpose of an oath of office. Constitutional questions aside, it should be rejected, simply because words should be given their plain meaning and not used to achieve purposes radically different from those intended by the draftsmen.

Moreover, the construction adopted below does raise a host of constitutional problems: vagueness (*infra*, p. 25),

effect upon the franchise (*infra*, p. 38), effect upon freedom of speech (*infra*, p. 27) and the prohibition against bills of attainder and *ex post facto* laws. These problems are so familiar that, even before studying them closely, the wisdom of Chief Judge Tuttle's admonition is evident: a court should first construe the statute with an eye to the avoiding of the constitutional question if possible (R. 166). See *Kent* v. *Dulles*, 357 U. S. 116; *United States* v. *Rumely*, 345 U. S. 41, 46.

POINT II

The oath provision of the Georgia Constitution, as interpreted below, is unconstitutionally vague under the Fourteenth Amendment.

The Georgia Constitution on its face contains an *explicit* statement of (i) the qualifications of Representatives,[23] (ii) disqualification after conviction of specific crimes and of "idiots and insane persons",[24] (iii) disqualification of persons holding other state offices, receiving other state benefits, or in default of their financial obligations.[25] There is nothing imprecise about any of these provisions.

But the court below as we have seen, *supra*, p. 23, has found that there is an *implicit* qualification for office—namely that a member-elect's past conduct indicates that he will support the state and federal Constitutions and that "on all measures which may come before me, I will so conduct myself, as will in my judgment be most conducive to the interest and prosperity of this State."

The Court below has changed the promissory oath into a representation as to the past. As thus construed, the oath

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[23] Article III, Section VI, Paragraph I, *infra*, p. 47.

[24] Article II, Section II, Paragraph I, *infra*, p. 48.

[25] Article III, Section IV, Paragraph VI, *infra*, p. 48.

provision authorizes a legislative majority to evaluate the oath-taker's opinions, past behavior and public statements to determine whether he is capable of taking the oath with sincerity. There are absolutely no standards for this judgment by the legislature.

In *Cramp* v. *Board of Public Instruction*, 368 U. S. 278, the Court doubted that the words "aid, support, advice, counsel or influence" to the Communist Party were "susceptible of objective measurement", *supra*, at 285-286; conversely, there is no more precision in evaluating Mr. Bond's "support" of the Constitution. Indeed, a recent Georgia legislature, whose members had taken this very oath, accused this Court of treason for its decisions protecting constitutional rights. Interposition Resolution, (March 9, 1956) H. R. 185, Georgia Laws 1956, No. 130, at 642.

Every legislator may have a different view as to whether the past behavior of a colleague indicates that his future behavior will "support the Constitution of this State and of the United States". Further, a promise to "conduct myself as will in my judgment, be most conducive to the interests and prosperity of this State" is no more precise than the promise to "promote . . . undivided allegiance to the government of the United States" which this Court held invalid in *Baggett* v. *Bullitt*, 377 U. S. 360.

It is apparent that the measuring rod found by the court below in the constitutional oath of office is vague enough when applied to conduct. It becomes absolutely meaningless when it is applied to public expressions of opinion, which are protected by the First Amendment, as the court below recognizes in the case of the ordinary citizen (R. 151). Where an oath "abut[s] upon sensitive areas of basic First Amendment freedoms" the vice of unconstitutional vagueness is aggravated since, as applied here, it would require all candidates for office to eschew clearly lawful activities. *Baggett* v. *Bullitt*, *supra*, at 372.

POINT III

Mr. Bond's exclusion from elected legislative office solely because of his opinions and public statements on national issues violated the guarantee of freedom of speech and his privileges and immunities under the First and Fourteenth Amendments.

Mr. Bond was denied his seat because of his public expression of opinion on domestic and foreign affairs. This is manifest from the charges filed against him (R. 13-20) and from the hearings in the committee and the House (R. 28-99). This action, endorsed by the court below, strikes at the First Amendment's imperative of a government based upon the consent of an informed citizenry. *Cox* v. *Louisiana,* 379 U. S. 536, 552; *Stromberg* v. *California,* 283 U. S. 359; *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 270; *Garrison* v. *Louisiana,* 379 U. S. 64; *DeJonge* v. *Oregon,* 299 U. S. 353, 365; *Terminiello* v. *Chicago,* 337 U. S. 1, 4; *Whitney* v. *California,* 274 U. S. 357, 375; *United States* v. *C. I. O.,* 335 U. S. 106.

This Court has recognized the importance to the public of securing information and knowledge in a wide variety of cases involving travel (*Kent* v. *Dulles,* 357 U. S. 116; *Aptheker* v. *Secretary of State,* 378 U. S. 500), freedom to receive information through the mail (*Lamont* v. *Postmaster General,* 381 U. S. 301), newspaper commentaries and advertisements (*New York Times Co.* v. *Sullivan, supra*), criminal libel against public officials (*Garrison* v. *Louisiana, supra*), immunity of government officials from libel (*Barr* v. *Matteo,* 360 U. S. 564) and the arts and literature (*Kingsley Pictures Corp.* v. *Regents,* 360 U. S. 684).

These cases have emphasized the central meaning of the First Amendment, namely,

> "the profound national commitment to the principle that debate on public issues should be uninhibited,

> robust, and wide open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co.* v. *Sullivan, supra,* at 270.

The exclusion from office of Mr. Bond cannot be squared with the principle that "the censorial power is in the people over the Government, and not in the Government over the people," 4 Annals of Congress 934 (1794) quoted by Mr. Justice Brennan in *The Supreme Court and the Meiklejohn Interpretation of the First Amendment,* 79 Harv. L. Rev. 1, 15.

The SNCC statement was a vigorous criticism of American foreign and domestic policy. It was entitled to constitutional protection regardless of whether or not one agrees with it. As Professor Meiklejohn says, "The vital point . . . is that no suggestion of policy shall be denied a hearing because it is on one side of the issue rather than another. . . . These conflicting views may be expressed, must be expressed, not because they are valid, but because they are relevant," Meiklejohn, *Political Freedom,* 26-28 (1948). And in *Kingsley Pictures Corp.* v. *Regents, supra,* at 688-89, Mr. Justice Stewart stated:

> "It is contended that the State's action was justified because the motion picture attractively portrays a relationship which is contrary to moral standards, the religious precepts, and the legal code of its citizenry. This argument misconceives what it is that the Constitution protects. Its guarantee is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax. And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing."

The First Amendment protection given to the SNCC statement is enhanced by the fact that it related to the functioning of the federal government. This is a subject

upon which the citizens' views are protected also by the privileges and immunities clause of the Fourteenth Amendment. Such is the teaching of *Crandall* v. *Nevada*, 6 Wall. (73 U. S.) 36; *The Slaughterhouse Cases*, 16 Wall. (83 U. S.) 36, 79, and *Hague* v. *C.I.O.*, 307 U. S. 496. In *United States* v. *Cruikshank*, 92 U. S. 542, 552, this Court said:

> "The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or the duties of the National Government, is an attribute of national citizenship and, as such, under the protection of and guarantied by, the United States."

This was applied in *Hague* v. *C.I.O.*, *supra*, at 512 where the Court held that

> "freedom to disseminate information concerning the provisions of the National Labor Relations Act, to assemble peaceably for discussion of the Act, and of the opportunities and advantages offered by it, is a privilege or immunity of a citizen of the United States secured against State abridgement by Section 1 of the Fourteenth Amendment . . ."

The opinion below does not challenge the constitutional right of SNCC to make the statement. Rather, it emphasizes the fact that Mr. Bond "was more than a private citizen; he was an officer and employee of SNCC and was about to become a member of the House of Representatives of Georgia" (R. 152). The court below was of the opinion that an elected member of the House was entitled to less constitutional protection than the average citizen. Underlying the opinion is the unarticulated view that Mr. Bond's elected position imposed upon him the obligation to support "national policy" or to be restrained in his criticism of it.

This is a conception of second class citizenship for a legislator, totally without support in logic or in the con-

stitutional history of legislative bodies. It is completely inconsistent with the duty which the office itself imposes upon the incumbent to engage in a continuing dialogue on public affairs with his constituents. This court has repeatedly recognized the critical importance of exposing the views and conduct of government officials to the view of their constituents and the public at large, *New York Times Co.* v. *Sullivan, supra; Garrison* v. *Louisiana, supra.*

The argument of the court below was rejected by this Court in *Wood* v. *Georgia,* 370 U. S. 375, where a sheriff was held in contempt for issuing a press release criticizing a judge's charge to a grand jury. The State had argued that "because the petitioner is sheriff of Bibb County and therefore owes a special duty and responsibility to the court and its judges, his right to freedom of expression must be more severely curtailed than that of an average citizen." (*Id.* at 393.) The Court's response was:

> "The petitioner was an elected official and had the right to enter the field of political controversy, particularly where his political life was at stake. Cf. *In re Sawyer,* 360 U. S. 622. The role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance." *Id.* at 394-95.

The court below also assumed that freedom of speech is solely for the benefit of the speaker. The contrary is of course true; indeed, the larger interest is that of the public, *Lamont* v. *Postmaster General of the United States, supra*; *Martin* v. *City of Struthers,* 319 U. S. 141, 143. There is a "paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything which might touch on an official's fitness for office is relevant", *Garrison* v. *Louisiana, supra.* If aspirants for public office are to be discreetly silent, how can the people intelligently "discuss the character and qualifications of candidates for their suffrage", *Coleman*

v. *MacLennan*, 78 Kan. 711, 724 (1908), quoted in *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 281.

The lower court's novel distinction between the rights of a citizen and those of a legislator led it to disregard the established principles applicable to the First Amendment. Thus, it began by stating that First Amendment rights could be impaired constitutionally "in the context of two fundamental principles of government: separation of powers and state government under our system of federalism" (R. 142). But there is no logical connection between "federalism" and the need to restrict speech. The First Amendment protects speech whatever the source of limitation: federal legislation, *Lamont* v. *Postmaster General, supra*, a state legislative body, *Sweezy* v. *New Hampshire*, 354 U. S. 234, a state judge, *Garrison* v. *Louisiana, supra* or a state criminal prosecution, *Dombrowski* v. *Pfister*, 380 U. S. 479.

Nor is there, any logical connection between the separation of powers doctrine and the need to restrict freedom of speech. That doctrine is not violated when the judicial branch protects First Amendment rights against impairment by either of the other two branches of state government. See, *e.g.*, *Sweezy* v. *New Hampshire, supra.*

The Court below further deviated from the now established method of testing the impairment of First Amendment rights when it applied what it called a "rational evidentiary basis test" (R. 151). For it treated this case as if it involved, not the freedoms of speech and franchise, but the regulation of business or property calling for deference to the legislative judgment (R. 150). But this is a case involving both freedom of speech and of franchise (*infra*, p. 38). It directly affects the "vitality of civil and political institutions in our society", *Terminiello* v. *Chicago*, 337 U. S. 1, 4, and the rights of the appellants and the public are not subject to so narrow a test.

When the rational evidentiary basis test was applied in 1938 to a purely economic issue, Mr. Justice Stone intimated in a famous footnote the distinction between economic regulation and the restriction of First Amendment rights, *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152, n. 4. This was fully articulated by Mr. Justice Jackson's opinion five years later in *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 639:

> "In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and *those cases in which it is applied for its own sake.* The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. *But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds.* They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect. It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case." (Emphasis supplied.)

During the quarter of a century that has elapsed since the *Carolene Products Co.* case it is fair to say that no case has been decided against a person asserting First Amendment rights upon the basis of the so-called rational evidentiary test. The test may have varied from clear and present danger, *Schenk* v. *United States*, 249 U. S. 47; *Wood* v. *Georgia*, 370 U. S. 375, 384, to "grave and imme-

diate danger", *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 639, to Chief Judge Learned Hand's variant, *United States* v. *Dennis*, 183 F. 2d 201 (2d Cir. 1950), *aff'd*, *Dennis* v. *United States*, 341 U. S. 494, 507. But the one test never adopted by this Court is that articulated below. There is absolutely no basis for the lower court's reliance upon decisions in two recent criminal cases in support of its rational evidence theory; those cases involved a very different proposition, that a criminal conviction will not stand under the Fourteenth Amendment if the record is devoid of evidence to sustain it. *Thompson* v. *Louisville*, 362 U. S. 199; *Garner* v. *Louisiana*, 368 U. S. 157 (R. 151). This is a far cry from a holding that a First Amendment right may be impaired or restricted if there is an iota of evidence to justify it.

It cannot be said that this case presents "some compelling state interest [which] justifies the substantive infringement of appellant's First Amendment rights", *Sherbert* v. *Verner*, 374 U. S. 398, 406. It must be remembered that "in this highly sensitive constitutional area, '[o]nly the gravest abuses endangering paramount interests, give occasion for permissible limitation' ". *Ibid*, citing *Thomas* v. *Collins*, 323 U. S. 516, 530. There is no substantial state interest involved here comparable to that found by the Court to exist in cases involving, *e.g.*, the power to investigate subversive activities (*Uphaus* v. *Wyman*, 360 U. S. 72), the power to regulate obscenity (*Mishkin* v. *New York*, 383 U. S. 502), and the power to regulate admission to the bar (*Konigsberg* v. *State Bar of California*, 366 U. S. 36).

The mild observations made by Mr. Bond or endorsed by him were far from "fighting words", and even fighting words were held insufficient to support an infringement of First Amendment rights in *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, and see *Garrison* v. *Louisiana*, *supra*. Mr. Bond's statement was made at a press interview. There was no threat of violence in the streets as

in *Feiner* v. *New York*, 340 U. S. 315, cf. *Edwards* v. *South Carolina*, 372 U. S. 229. This Court reversed a conviction in *Herndon* v. *Lowry*, 301 U. S. 242, because there was no situation of imminent danger. Certainly there was no imminent danger here, nor was there even a remote threat of a "putsch", cf. *Dennis* v. *United States*, 341 U. S. 494; Gellhorn, *American Rights* (1960) 76. Here there was a peaceful statement made to a newspaper man in response to his question.

The court below did not properly apply its own test when it concluded that Mr. Bond's statements "could reasonably be said to be inconsistent with and repugnant to the oath which he was required to take" (R. 153). There is nothing in this record to suggest that Mr. Bond would not support the state and federal Constitutions and would not conduct himself as would in his judgment "be most conducive to the interests and prosperity of this State." There is nothing in the record which would cast doubt upon his integrity; on the contrary, his statements are impressive in their candor and they reflect an admirable concern for the public welfare.

The SNCC statement was a vigorous expression by a Negro organization of its views concerning inadequate protection of the civil rights and lives of the Negroes in this country, and strong opposition to the present war in Viet Nam. It is fair to say that a large section of the intellectual community is openly critical of the Administration's conduct of the war.[26] Such opposition is not unusual in a democracy. Its tradition is reflected in the parliamentary opposition to the English war against the colonies and in American congressional opposition to the Mexican and

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[26] See *e.g.* Commager, *Can we Control the War in Viet-Nam*, Saturday Review, Sept. 17, 1966, 25.

Civil Wars. See, *e.g.*, Chafee, *Free Speech in the United States* (1964) 267 and *passim.*

The statement of the court below that "the SNCC statement is at war with the national policy of this country" (R. 151) is a very strange statement for a court to make under our system of government. There is no such thing as a "national policy" to which dissenting views must be subordinated. That would be indeed the "unanimity of the graveyard" of which Mr. Justice Jackson spoke in *West Virginia State Board of Education* v. *Barnette, supra,* at 641.

The SNCC statement which encouraged alternative work in the civil rights movement as "a valid alternative to the draft", was an expression of sympathy, not of action or its incitement. It violated no law. The Selective Service Law expressly provides for exemption for conscientious objectors 50 U. S. Code App. § 456(j) which the Court has construed broadly in *United States* v. *Seeger,* 380 U. S. 163.

The regulations of the Selective Service System make provision for alternative service or deferments in the national interest, even for persons who are not conscientious objectors, 32 CFR § 1660 et seq. Such work of the kind recommended by SNCC has been found acceptable by Selective Service Boards as an alternative to military service.

Aside from its animadversions on SNCC for its statement, there was even less justification for the court below to conclude that Mr. Bond's statements were repugnant to his oath of office. He is a Negro and a pacifist who is opposed to all war. He did not draft the SNCC statement, nor did he issue a "call to action" (R. 36). He merely responded to a newspaper man's inquiry as to whether he agreed with the statement (R. 110). Should

he have concealed his agreement with the SNCC statement by refusing to answer the press or by telling an untruth?

The court below also referred to Mr. Bond's statement "that he admired the courage of anyone who burned his draft card" (R. 152). This, too, was a response to the press inquiry. A fair reading of the statement—required in the interest of freedom of expression—supports Mr. Bond's explanation when he appeared before the House committee:

> "I have never suggested or counseled or advocated that any one other person burn their draft card. In fact, I have mine in my pocket and will produce it if you wish. I do not advocate that people should break laws. What I simply try to say was that I admired the courage of some one who could act on his convictions knowing that he faces pretty stiff consequences" (R. 41).

This is no different from the recognition by courts of the integrity of persons even while sustaining their convictions; see *e.g., Uphaus* v. *Wyman, supra.* It is also an oversimplification to suggest that persons charged either with refusal to serve in the armed forces or with the burning of draft cards have committed a crime or are necessarily without constitutional protection. Recent judicial opinions attest to the fact that important First Amendment and other constitutional questions may be involved. See *e.g.* Judge Medina's opinion in *United States* v. *Mitchell,* 354 F2d 767 (2d Cir. 1966) and the opinion in *United States* v. *Miller,* 249 F. Supp. 59 (S.D.N.Y. 1965) pending on appeal.

The mild remarks made here are in contrast to the activities ascribed to the Socialist Assemblymen in January 1920, when they were expelled from the New York legislature on the serious charges of their participation in a revolutionary organization connected with the Communist

International in Moscow which was allegedly pledged to the violent overthrow of the Government of the United States.[27] Despite the fact that the First Amendment, as we know it today, had not developed through judicial decision, former Justice (later Chief Justice) Hughes filed a brief on behalf of the Association of the Bar of the City of New York opposing the action of the legislature and calling attention to the protection of free speech in England. See Chafee, *op. cit. passim,* and Pusey, *Charles Evans Hughes.* (1951) I, 391-393.

The state has no legitimate interest in maintaining a legislature without diversity of opinion. On the contrary, there is "a compelling state interest" that the electorate be free to choose its representatives in the House whatever their political views or expressions of opinion. This interest was stated by Chief Judge Learned Hand in his *"Risk for Risk"* statement in 1952:

> "I believe that that community is really in process of dissolution where each man begins to eye his neighbor as a possible enemy, where non-conformity with the accepted creed, political as well as religious, is a mark of disaffection; where denunciations, without specification or backing, takes the place of evidence; where orthodoxy chokes freedom of dissent; where faith in the eventual supremacy of reason has become so timid that we dare not enter our convictions in the open lists, to win or lose. Such fears as these are a solvent which can eat out the cement that binds the stones together; they may in the end subject us to a despotism as evil as any that we dread . . ." Address before Convocation of the University of the State of New York, October 25, 1952, reprinted in *The Spirit of Liberty, Papers and Addresses of Learned Hand* (Dilliard ed. 1953) 284.

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[27] Cf. the subsequent decisions in *Yates* v. *United States,* 354 U. S. 298; *Noto* v. *United States,* 367 U. S. 290.

POINT IV

Mr. Bond's constituents have been disenfranchised in violation of the Fourteenth Amendment.

The people of the 136th House District have twice elected Mr. Bond to represent them in the Georgia House of Representatives. On both occasions the House refused to admit him because it disapproved of his public statements. This legislative fiat did more than deprive him of his property without due process of law; it deprived the residents and voters of House District 136 of their representation in the House.

This strikes directly at the fundamental principle of democratic government that it is the people who have absolute power to dictate their choice of Representatives. This was one of the "Blessings of Liberty" for which the United States Constitution was established. It pervades the Constitution—the provision for the election of Representatives "by the people of the several states" (Article I, Section 2), the guarantee to every state of a "republican form of government" (Article IV, Section 4), the right to vote under the Fourteenth and Fifteenth Amendments.

The view of the court below that the appellees, Dr. Martin Luther King and Mrs. Arel Keyes, do not have a direct interest in this litigation is inexplicable. Dr. King is a constituent of Mr. Bond. Mrs. Keyes is a registered voter. Both have been deprived of representation by the House Resolution whose legality is in question here.

There can be no more direct right in litigation of this kind than that of persons who suffer from the injury.[28]

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[28] *Barry* v. *United States*, 279 U. S. 597, relied upon by the court below, involved the Congressional power of investigation, not standing to sue, and the temporary delay in seating *during* the investigation.

Mrs. Keyes' right to vote becomes meaningless if her choice is to be overridden by a legislative majority. She, like any person whose right to vote is impaired (*Smith* v. *Allwright*, 321 U. S. 649; *Baker* v. *Carr*, *supra*, 204-208; *Gray* v. *Sanders*, 372 U. S. 368, 375) has standing to sue. Dr. King as a resident of the district has a right to be represented in the legislature even if the period of his residence did not, at the time the litigation was instituted, give him a right to vote. Only thus do we adhere to the principle that "the form of government must be representative," (Mr. Justice Clark concurring in *Baker* v. *Carr*, 369 U. S. 186, 261). See also *Wesberry* v. *Sanders*, 376 U. S. 1, 17; *Reynolds* v. *Sims*, 377 U. S. 533, 560.

The principal importance of the Wilkes case is not that it protected the property right of the elected member but that it involved "the rights of the freeholders of Middlesex" to have their designee represent them, *supra*, pp. 19, 20. Mr. Madison was equally concerned with the right of franchise as a "fundamental article[s] in a Republican Government", *supra*, p. 20.

The emphasis of Charles Evans Hughes, speaking for the Association of the Bar of the City of New York in opposition to the exclusion in 1920 of the five Socialist members of the New York Assembly, was upon the same issue of freedom of franchise.

> "Let every resource of inquiry, of pursuit, of prosecution be employed to ferret out and punish the guilty according to our laws. But I count it a most serious mistake to proceed, not against individuals charged with violation of law, but against masses of our citizens combined for political action, by denying them the only resource of peaceful government; that is, action by the ballot box and through duly elected representatives in legislative bodies." Chafee, *op. cit.* 273.

He urged that "these members shall enjoy all the privileges of their seats in recognition of their own rights and of the rights of their constituencies", Chafee, *op. cit.* 275. And as Professor Chafee has said of the New York Assembly:

> "It appealed to force as the normal method of settling conflicts between ideas. It disenfranchised 60,000 American citizens on the basis of a caricature of Socialism. It repudiated government by representation and substituted government by misrepresentation." Chafee, *op. cit.* 282.

This particular problem has never been presented to this Court. But the Court has repeatedly spoken on the fundamental importance of the right of suffrage. The Chief Justice has said that "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds* v. *Sims*, 377 U. S. 533, 535 (1964), and

> "Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections. A consistent line of decisions by this Court in cases involving attempts to deny or restrict the right of suffrage has made this indelibly clear. It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote, *Ex parte Yarbrough*, 110 U. S. 651, and to have their votes counted, *United States* v. *Mosely*, 238 U. S. 383. . . . The right to vote can neither be denied outright, *Guinn* v. *United States*, 238 U. S. 347, *Lane* v. *Wilson*, 307 U. S. 268, destroyed by alteration of ballots, see *United States* v. *Classic*, 313 U. S. 299, 315, nor diluted by ballot-box stuffing, *Ex parte Siebold*, 100 U. S. 371, *United States* v. *Saylor*, 322 U. S. 385. As the court stated in *Classic*, 'Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted. . . .' 313 U. S. at 315. . . . And the right of suffrage can be denied

> by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds* v. *Sims, supra* at 554-55.

The exclusion of the elected representative nullifies the votes of his constituents. Where the right to vote is concerned, this Court looks to the substance and not the form. See *United States* v. *Classic,* 313 U. S. 299; *Smith* v. *Allwright,* 321 U. S. 649; *Terry* v. *Adams,* 345 U. S. 461. "[E]ach and every citizen has an inalienable right to full and effective participation in the political processes of his State legislative bodies." *Reynolds* v. *Sims, supra* at 565. Obviously, the exclusion of his Representative deprives him of the right to "effective participation."

Further, "'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible. '[T]he exercise of rights so vital to the maintenance of democratic institutions,' *Schneider* v. *State,* 308 U. S. 147, 161, cannot constitutionally be obliterated because of a fear of the political views of a particular group of bona fide residents." *Carrington* v. *Rash,* 380 U. S. 89, 94. In the instant case, the "fencing out" was done after the ballots were counted and the political views were expressed, but there is no difference in principle which can be based on the stage of the electoral process.

We agree with the court below that there was no direct evidence that the ineligibility of Mr. Bond was predicated upon his race, rather than upon his political opinions (R. 141, 153). It is unnecessary for the appellants to establish such motivation in view of the direct impact of the appellees' action upon the First Amendment, upon the privilege to discuss federal issues and upon freedom of franchise. But it would be completely unrealistic not to recognize the racial background of the current dispute. In 1966 Georgia did not engage in a wholesale expulsion of the Negro

members of its legislature, as in 1868 (see Du Bois, *Black Reconstruction in America* (1935) 501-504).[29] But it does have a long contemporary record of discrimination against the Negro in many fields [30] and the representative excluded in the instant case was a Negro representing a Negro constituency who presumed to express himself openly on matters of domestic and foreign policy.

POINT V

The disqualification of Mr. Bond was a bill of attainder and an *ex post facto* law.

This case is governed by much of what the Chief Justice stated for the Court in *United States* v. *Brown*, 381 U. S. 437. The historical discussion, the analysis of the elements of bills of attainder and the tests to be employed —as described in that opinion—are dispositive of the issues in this case. In *Brown*, it was pointed out that the bill of attainder was a parliamentary act imposing punishment for political crime; that the punishment often included the exclusion of the person involved and his sons from Parliament, and that the act frequently named the parties affected, *United States* v. *Brown, supra*, at 441-2.

A review of the reasons for the inclusion of the proscription against bills of attainder either by the Congress or the States into the Constitution led this Court to conclude that "the bill of attainder clause was intended not as a narrow technical (and, therefore, soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply —trial by legislature." *Id.* at 442.

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[29] See also Thompson, *Reconstruction in Georgia* (LXIV Studies in History, Economics and Public Law, Columbia University, 1915), 211-216.

[30] See the cases cited in the brief *amicus curiae* herein of the Emergency Civil Liberties Committee, p. 7.

The instant case shows more of the classic attributes of the bill of attainder in some respects than any of the previously decided cases in this Court. Like all of them, it was an act of the legislative branch imposing sanctions for political crime; see *Cummings* v. *Missouri*, 4 Wall. (71 U. S.) 277; *Ex parte Garland*, 4 Wall. (71 U. S.) 333; *United States* v. *Lovett*, 328 U. S. 303; *United States* v. *Brown*, *supra*. But, unlike three of those cases, the legislative act actually named the individual against whom it was directed; and unlike all of them, it disqualified a member of the legislative body itself—a most familiar sanction of the English bill of attainder.

It will, of course, be argued by the appellees, as was done by the government in all the preceding bill of attainder cases, including *Brown*, that disqualification from office is not punishment, but is intended merely to regulate the qualifications of admission to office. But in *Garland*, the Court said that "disqualification from office may be punishment, as in cases of conviction upon impeachment", 4 Wall. at 320. In words appropriate to appellant Bond, in the light of the appellees' *reaffirmation* of his ineligibility, this Court said in *Lovett*, *supra*, that the "permanent proscription of any member to serve the government is punishment and of a most serious type", 328 U. S. 303, 316.

In *Brown*, the Solicitor General presented the argument in more sophisticated form by urging, to use this Court's words, "that the statute was enacted for preventive rather than retributive reasons—that its aim was not to punish Communists for what they have done in the past but rather to keep them from a position where they will in the future be able to bring about undesirable events." *United States* v. *Brown*, *supra*, at pp. 456-57.

But this approach, which had at least the support of repeated expressions of view by all branches of the government, was anticipated by this Court's observation that the

framers had sought to bar "legislative punishment of any form or severity." *Id.* at 447. In *Brown*, the Court described as "archaic" the attempt to limit the definition of punishment to retribution, stating:

> "One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any less punishment." *Id.* at 458.

And in a look at history, the Chief Justice added:—

> "A number of English bills of attainder were enacted for preventive purpose—that is, the legislature made a judgment, undoubtedly based upon past acts and associations (as § 504 is) that a given person or group was likely to cause trouble (usually, overthrow the government) and therefore inflicted deprivations on that person or group in order to keep them from bringing about the feared event." *Id.* at 458-59.

The legislative act against Mr. Bond falls squarely within the scope of the bill of attainder clause. The very charges against him were that he "adheres to the enemies of the United States and of the State of Georgia" (R. 14) that he "gives aid and comfort" to those enemies and that his actions and statements violate 50 U. S. C. App. §§ 462(a) and (b) (R. 14). The intemperate remarks made by his judges in the course of the Committee and House hearings well illustrate Mr. Cooley's warning that the legislative body "is not properly constituted to try with coolness, caution and impartiality a criminal charge especially in those cases in which the popular feeling is strongly excited—the very class of cases most likely to be prosecuted by this mode." 1 Cooley, *Constitutional Limitations*, 536-537 (8th ed. 1927), quoted by this Court in *United States* v. *Brown*, *supra*, at 445. Indeed, this emotional approach was manifested by the use in the court below of such an expression as "at war with the national policy of this country" (R. 151).

A legislative punishment for expressions of political opinion is not any the less a bill of attainder because it is phrased in terms of inability to take an oath to support the federal and state constitutions. We note elsewhere that nothing in Georgia law authorizes its legislature to determine whether a person can conscientiously take the oath, *supra,* p. 24, and that the oath provision, if thus construed, has the constitutional defect of vagueness, *supra,* p. 25. But this aside, this Court has repeatedly noted that the form of the legislative act is irrelevant to its classification as a bill of attainder, *United States* v. *Brown, supra,* at 448; *United States* v. *Lovett, supra,* at 315, 316.

Like many other bills of attainder, House Resolution 19 is also an *ex post facto* law in violation of Article I, Section 10 of the Constitution. There is nothing in the language of the Georgia Constitution, statutes or the judicial decisions, which could support the right of the legislature to evaluate the public statements of an electee and to decide that he cannot conscientiously take the oath.

This, then, is an entirely new qualification, written for the day and the man. It was not one generally applicable at the time of Mr. Bond's election; he had no reason to believe that his public statements could be the basis for disqualification. As to him—and those who elected him—House Resolution 19 is an *ex post facto* law. *Calder* v. *Bull,* 3 Dall. (3 U. S.) 386, 390; *De Veau* v. *Braisted,* 363 U. S. 144, 160.

CONCLUSION

The judgment of the District Court should be reversed with instructions to enter judgment for the relief demanded in the complaint.

Respectfully submitted,

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September 24, 1966.

APPENDIX

Constitutional Provisions and Legislative Acts Involved

Article III, Section VII, Paragraph I, of the Georgia Constitution provides in pertinent part as follows:

> "Election, returns, etc.; disorderly conduct.—Each House shall be the judge of the election, returns, and qualifications of its members and shall have power to punish them for disorderly behavior, or misconduct, by censure, fine, imprisonment, or expulsion but no member shall be expelled, except by a vote of two-thirds of the House to which he belongs." (2-1901, Ga. Code Ann.)

Article III, Section VI, Paragraph I, of the Georgia Constitution provides in pertinent part as follows:

> "Qualifications of representatives.—The Representatives shall be citizens of the United States who have attained the age of twenty-one years, and who shall have been citizens of this State for two years, and for one year residents of the counties from which elected. (2-1801, Ga. Code Ann.)

Article III, Section IV, Paragraph V, of the Georgia Constitution provides in pertinent part as follows:

> "Oath of members.—Each senator and representative, before taking his seat, shall take the following oath, or affirmation, to wit: 'I will support the Constitution of this State and of the United States, and on all questions and measures which may come before me, I will so conduct myself, as will, in my judgment, be most conducive to the interests and prosperity of this State.'" (2-1605, Ga. Code Ann.)

Article II, Section II, Paragraph I, of the Georgia Constitution provides in pertinent part as follows:

> "'Registration of electors; who disfranchised.—The General Assembly may provide, from time to time, for the registration of all electors, but the following classes of persons shall not be permitted to register, vote, or hold any office, or appointment of honor, or trust in this State, to wit: 1st. Those who shall have been convicted in any court of competent jurisdiction of treason against the State of embezzlement of public funds, malfeasance in office, bribery or larceny, or of any crime involving moral turpitude, punishable by the laws of this State with imprisonment in the penitentiary, unless such persons shall have been pardoned. 2nd. Idiots and insane persons." (2-1801, Ga. Code Ann.)

Article III, Section IV, Paragraph VI, of the Georgia Constitution provides in pertinent part as follows:

> "Eligibility; appointments forbidden.—No person holding a military commission, or other appointment, or office, having an emolument, or compensation annexed thereto, under this State, or the United States or either of them except Justices of the Peace and officers of the militia, nor any defaulter for public money, or for any legal taxes required of him shall have a seat in either house; nor shall any Senator, or Representative, after his qualification as such, be elected by the General Assembly, or appointed by the Governor, either with or without the advice and consent of the Senate, to any office or appointment having any emolument annexed thereto, during the time for which he shall have been elected, unless he shall first resign his seat, provided, however, that during the term for which he was elected no Senator or Representative shall be appointed to

any civil office which has been created during such term." (2-1601, Ga. Code Ann.)

Article VII, Section III, Paragraph VI, of the Georgia Constitution provides in pertinent part as follows:

"Profit on public money.—The receiving, directly or indirectly, by any officer of State or county, or member or officer of the General Assembly of any interest, profits or perquisites, arising from the use or loan of public funds in his hands or moneys to be raised through his agency for State or county purposes, shall be deemed a felony, and punishable as may be prescribed by law, a part of which punishment shall be a disqualification from holding office." (2-5606, Ga. Code Ann.)

House Rule 61 of the Georgia House of Representatives provides in pertinent part as follows:

"Each house shall be the judge of the election, returns, and qualifications of its members and shall have power to punish them for disorderly behavior, or misconduct, by censure, fine, imprisonment, or expulsion; but no member shall be expelled except by a vote of two-thirds of the House to which he belongs."

House Resolution 19 of January 10 1966 of the Georgia House of Representatives provides in pertinent part as follows:

"Relative to the matter of the seating of Representative-Elect Julian Bond; and for other purposes.

"WHEREAS, a special committee created pursuant to H.R. No. 7 which was appointed for the purpose of holding a hearing on petitions challenging and contesting the seating of Representative-Elect Julian

Bond of the 136th District has conducted a hearing in said matter; and

"WHEREAS, said committee has submitted a report in which it is recommended that Representative-Elect Julian Bond not be allowed to take the oath of office as a Representative of the House of Representatives and that he not be seated as a member of the House of Representatives.

"NOW, THEREFORE, BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES that the report of the aforesaid committee is hereby adopted and the recommendations contained therein shall be followed.

"BE IT FURTHER RESOLVED that Representative-Elect Julian Bond shall not be allowed to take the oath of office as a member of the House of Representatives, and that Representative-Elect Julian Bond shall not be seated as a member of the House of Representatives.

"BE IT FURTHER RESOLVED that the Clerk of the House is hereby instructed to immediately transmit a copy of the aforesaid report and a copy of this resolution to the Governor, to the Secretary of State and to Representative-Elect Julian Bond."

OCT 5 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968

No. 37

JULIAN BOND, *et al.*,

Appellants,

v.

JAMES "SLOPPY" FLOYD, *et al.*,

On Appeal from the United States District Court for the Northern District of Georgia (Atlanta Division)

BRIEF OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AS *AMICUS CURIAE*

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IN THE

Supreme Court of the United States

October Term, 1966

No. 87

JULIAN BOND, *et al.*,

Appellants,

v.

JAMES "SLOPPY" FLOYD, *et al.*,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA (ATLANTA DIVISION)

BRIEF OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AS *AMICUS CURIAE*

Statement of Interest

This brief *amicus curiae* is filed by the National Association for the Advancement of Colored People (NAACP) with the consent of the parties in accord with Rule 42 of the Rules of this Court.

The NAACP is a New York membership corporation with approximately 1,500 local affiliates in 46 of the 50 states. The aims and purposes of the NAACP overall are to secure to Negroes full and equal citizenship rights and to free them from the onerous barriers, restrictions, limitations and burdens of race. One of its specific and immediate objectives is for all qualified Negroes to be able to exercise the unfettered right to vote and participate freely in the political affairs of the nation at local, state and

national levels. Pursuant in part to its efforts, increasing numbers of Negroes are now asserting their franchise rights and are being elected to public office in the South. The emergence of the Negro as a vital force in the political arena in the South, an indispensable prerequisite to full and equal citizenship, is gravely imperiled in these proceedings.

Julian Bond, appellant here, was refused his seat as a member of the House of Representatives of the General Assembly of the State of Georgia. He had been duly elected to that office from House District No. 136 for the session of the General Assembly commencing January 10, 1966. When the legislative session began, appellant because of challenges to his qualifications was asked to step aside while other members of the House of Representatives took the oath of office. After the other members had been sworn and seated, the Speaker of the House referred the challenge to appellant's right to be seated to a special committee designated for the purpose. After hearing, the committee recommended that appellant not be seated because he did not meet requisite standards. This recommendation was acted upon favorably by the House by a vote of 184-12. Whereupon these proceedings were instituted in the court below.

The facts upon which the committee based its recommendation and the House its decision are these: The Student Non Violent Coordinating Committee (SNCC) issued a statement on January 6, 1966 opposing the involvement of the United States in the war in Viet Nam. It accused our government of deception "in its claims of concern for freedom of the Vietnamese people," of not being determined "to end the rule of terror and oppression within its own borders." Those unwilling to respond to the draft were applauded, and SNCC asserted that work "in the civil rights movement and with other human relations organizations is a valid alternative to the draft."

At the time appellant Bond was an officer in SNCC and publicly supported the statement in its entirety. Subsequently appellant told a newspaper reporter on inquiry that while he would not burn his own draft card, he admired the courage of those who did. Mr. Bond described himself as a pacifist, opposed to the war in Viet Nam and eager and anxious to encourage people not to participate in it. He explained that he favored the SNCC position because he felt it to be "hypocritical" for the United States to maintain that we are fighting for freedom in other places when we are not guaranteeing liberty to citizens inside the continental United States. For these statements appellant Bond was found not qualified to a seat in the House of Representatives.

At stake here is appellant's right as a public official to express his views on a matter of public interest and concern. In the absence of some overriding circumstances warranting a contrary result, appellant should be free to have his say, however erroneous or misguided. The propriety of Mr. Bond expressing these views as a public official representing the electors of House District No. 136 is a matter for the determination of the voters of that district. Since Mr. Bond has been reelected on two occasions after the House refused to allow him to take his seat, it is clear that a majority of the voters of House District No. 136 do not consider Mr. Bond's views a disqualification.

The underlying implications of the action taken here is to consign Negro electors and office holders to second-class status, inferior and different from that occupied by white electors and office holders. Thus, the outcome of this case is of serious import to the Negro's struggle for equal rights and equal justice. The merits of appellant's views are not at issue here. What is presented is his right to speak on the same terms and conditions as any other duly elected member of the House of Representatives. For these reasons the

NAACP is filing this brief with the hope that its presentation will aid the Court in appreciating more fully in all its ramifications the fundamental issue raised in these proceedings.

ARGUMENT

Race Discrimination Is Inextricably Involved in the Decision to Refuse to Seat Appellant.

The court below ruled that the "charge of racial discrimination and thus of denial of equal protection of the law is without foundation in fact." It was observed that the "contention that Mr. Bond was denied his seat because of his race was resolved adversely to him from the bench during the hearing of the matter."[1] This conclusion was reached because the court held that to find race discrimination a factor here would be "to create license in the name of race."[2]

It is this Court's consistent practice to make its own independent evaluation of the evidentiary facts upon which a lower court's adjudication of constitutional claims is based. *Edwards v. South Carolina*, 372 U. S. 229; *Blackburn* v. *Alabama*, 361 U. S. 199; *Spano* v. *New York*, 360 U. S. 315; *Napue* v. *Illinois*, 360 U. S. 264; *Muir* v. *Louisville Park Theatrical Association*, 120 F. Supp. 525 (W. D. Ky. 1951), aff'd, 202 F.2d 275 (6th Cir. 1953), vacated and remanded 344 U. S. 971; *Niemotko* v. *Maryland*, 340 U. S. 268; *Feiner* v. *New York*, 340 U. S. 315, 316, 322 fn. 4; *Watts* v. *Indiana*, 338 U. S. 49, 50-51; *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 659; *Pierre* v. *Louisiana*, 306 U. S. 354, 358; *Baltimore & Ohio Railroad Company* v. *United States*, 298 U. S. 349,

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[1] See case below reported in 251 F. Supp. 333, 339 (N. D. Ga. 1966).

[2] *Ibid.*

372; *St. Joseph Stock Yards Company* v. *United States,* 298 U. S. 38, 49-55; *Norris* v. *Alabama,* 294 U. S. 587, 589, 590; *Ohio Valley Water Company* v. *Ben Avon Borough,* 253 U. S. 287. Cf. *Ng Fung Ho* v. *White,* 259 U. S. 276, 284, 285. And see Jaffe, "Judicial Review: Constitutional and Jurisdictional Fact," 70 Harv. L. Rev. 953 (1957). It is respectfully submitted that such scrutiny in this case will reveal the error of the court below in ignoring race discrimination which was the generating force behind these proceedings, as a factor here.

After the 1954 Supreme Court decision striking down the separate but equal doctrine in public schools as violative of the Fourteenth and Fifth Amendments, *Brown* v. *Board of Education of Topeka,* 347 U. S. 483; *Bolling* v. *Sharp,* 347 U. S. 487, the Georgia State Legislature passed House Resolution No. 185 of the 1956 Session of the General Assembly of Georgia which provided in part:

> A Resolution to declare the Supreme Court decisions of May 17, 1954 and May 31, 1955, in the school segregation cases, and all similar decisions, by the Supreme Court null, void and of no effect; to declare that a contest of powers has arisen between the State of Georgia and the Supreme Court of the United States; to invoke the doctrine of interposition; and for other purposes.[3]

---

[3] The remainder of the Resolution, as represented in 1 Race Rel. L. Rep. 438-440 (1956) reads in part:

BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES, THE SENATE CONCURRING, That the General Assembly of Georgia, doth hereby unequivocally express a firm and determined resolution to maintain and defend the Constitution of the United States, and the Constitution of this State against every attempt, whether foreign or domestic, to undermine and destroy the fundamental principles, embodied in our basic law, by which the liberty of the people and the sovereignty of the States, in their proper spheres, have been long protected and assured;

That the General Assembly of Georgia doth explicitly and preemptorily declare that it views the powers of the Federal Government as resulting solely from the compact, to which the States are par-

The House approved this Resolution by a vote of 179-1.

(Footnote 3 continued)

ties, as limited by the plain sense and intention of the instrument creating that compact;

That the General Assembly of Georgia asserts that the powers of the Federal Government are valid only to the extent that these powers have been enumerated in the compact to which the various States assented originally and to which the States have assented in subsequent amendments validly adopted and ratified;

* * *

That the State of Georgia has at no time surrendered to the General Government its rights to maintain racially separate public schools and other public facilities;

That the State of Georgia, in ratifying the Fourteenth Amendment to the Constitution, did not agree, nor did the other States ratifying the Fourteenth Amendment agree, that the power to operate racially separate public schools and other facilities was to be prohibited to them thereby;

* * *

That the General Assembly of Georgia denies that the Supreme Court of the United States had the right which it asserted in the school cases decided by it on May 17, 1954, to enlarge the language and meaning of the compact by the States in an effort to withdraw from the States powers reserved to them and as daily exercised by them for almost a century;

That a question of contested power has arisen; the Supreme Court of the United States asserts, for its part, that the States did in fact prohibit unto themselves the power to maintain racially separate public institutions and the State of Georgia, for its part, asserts that it and its sister States have never surrendered such right;

That this assertion upon the part of the Supreme Court of the United States, accompanied by threats of coercion and compulsion against the sovereign States of this Union, constitutes a deliberate, palpable, and dangerous attempt by the Court to prohibit to the States certain rights and powers never surrendered by them;

That the General Assembly of Georgia asserts that whenever the General Government attempts to engage in the deliberate, palpable and dangerous exercise of powers not granted to it, the States who are parties to the compact have the right, and are in duty bound, to interpose for arresting the progress of the evil, and for maintaining, within their respective limits, the authorities, rights and liberties appertaining to them;

* * *

That if said Court had had jurisdiction and authority to try and determine said cases, it was powerless to interfere with the operation

Among those voting with the majority were 14 representa-

(Footnote 3 continued)

of the public schools of States, because the Constitution of the United States does not confer upon the General Government any power or authority over such schools or over the subject of education, jurisdiction over these matters being reserved to the States, nor did the States by the Fourteenth Amendment authorize any interference on the part of the Judicial Department or any other department of the Federal Government with the operation by the States of such public schools as they might in their discretion see fit to establish and operate;

That by said cases the Court announces its power to adjudge State laws unconstitutional upon the basis of the Court's opinion of such laws as tested by rules of the inexact and speculative theories of psychological knowledge, which power and authority is beyond the jurisdiction of said Court;

That if the Court is permitted to exercise the power to judge the nature and effect of a law by supposed principles of psychological theory, and to hold the statute or Constitution of a State unconstitutional because of the opinions of the Judges as to its suitability, the States will have been destroyed, and the indestructible Union of Indestructible States established by the Constitution of the United States will have ceased to exist, and in its stead the Court will have created, without jurisdiction or authority from the people, one central government of total power;

That implementing its decision of May 17, 1954, said Court on May 31, 1955, upon further consideration of said cases, said: "All provisions of Federal, State, or local law . . . must yield" to said decision of May 17, 1954; said Court thereby presuming arrogantly to give orders to the State of Georgia;

That it is clear that said Court has deliberately resolved to disobey the Constitution of the United States, and to flout and defy the Supreme Law of the Land;

That the State of Georgia has the right to operate and maintain a public school system utilizing such educational methods therein as in her judgment are conducive to the welfare of those to be educated and the people of the State generally . . .

* * *

That the duty and responsibility of protecting life property and the priceless possessions of freedom rests upon the Government of Georgia as to all those within her territorial limits. The State alone has this responsibility. Laboring under this high obligation she is possessed of the means to effectuate it. It is the duty of the State

tives who in 1966 voted to refuse to seat Julian Bond.[4]

(Footnote 3 continued)

in flagrant cases such as this to interpose its powers between its people and the effort of said Court to assert an unlawful dominion over them;

THEREFORE, BE IT FURTHER RESOLVED BY THE HOUSE OF REPRESENTATIVES, THE SENATE CONCURRING:

First: That said decisions and orders of the Supreme Court of the United States relating to separation of the races in the public institutions of a State as announced and promulgated by said Court on May 17, 1954, and May 31, 1955, are null, void and of no force or effect;

Second: That hereby there is declared the firm intention of this State to take all appropriate measures honorably and constitutionally available to the State, to avoid this illegal encroachment upon the rights of her people;

Third: That we urge upon our sister States firm and deliberate efforts upon their part to check this and further encroachment on the part of the General Government, and on the part of said Court through judicial legislation, upon the reserved powers of all the States, that by united efforts the States may be preserved. . . .

[4] The 14 representatives voting in favor of the House Resolution No. 185 and voting not to seat Bond, are:

George T. Bagby of Dallas
Mac Barber of Commerce
J. Lucius Black of Preston
Johnnie L. Caldwell of Thomaston
James H. Floyd of Trion
A. T. Land, Sr., of Allentown
Chappelle Matthews of Athens
Tom C. Palmer, Jr., of Chamblee (in 1956 a representative from Pelham)
Glenn S. Phillips of Harlem
Mac Pickard of Columbus
Emory L. Rowland of Wrightsville
George L. Smith, II of Swainsboro
Joe C. Underwood of Mt. Vernon
W. M. "Bill" Williams of Gainesville

See House *Journal*, Georgia General Assembly, Regular Session, 1956, pp. 782-783 for roll-call vote on the Interposition Resolution.

During the same 1956 session, the Georgia House passed a law providing punishments for "any peace officer . . . who knowingly refuses or fails to attempt to enforce any law of this state requiring segregation. . . ."[5] This act punish-

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[5] Act No. 197, 1956 Session of the General Assembly of Georgia as reprinted in 1 Race Rel. L., Rep. 450-451 (1956) in part provides:

§ 1. An act to provide revenue and a source of revenue for the purpose of paying annuities and benefits to the peace officers of the State of Georgia; to provide for a commission to receive and disburse such funds; to provide for a method of payment of such funds to beneficiaries thereof, and for other purposes, approved February 1, 1950 (Ga. Laws 1950, p. 50), as amended by an Act approved February 21, 1951 (Ga. Laws 1951, p. 472), An Act approved February 12, 1952 (Ga. Laws 1952, p. 81), An Act approved March 11, 1953 (Ga. Laws 1953, Jan.-Feb. session, p. 574), an Act approved January 5, 1954 (Ga. Laws 1953, Nov.-Dec. session, p. 488), and an Act approved March 3, 1955 (Ga. Laws 1955, p. 387), is hereby amended by adding thereto, as amended, a new Section to be known as Section 26 and to read as follows:

"(a) Any peace officer, as herein defined, except wardens or prison guards of any State, County or City Public Works Camp or Prison, who knowingly refuses or fails to attempt to enforce any law of this State requiring segregation or separation of the White and colored races in any manner or activity, or any such peace officer who knowingly fails to take any necessary or appropriate action for such enforcement thereof shall forfeit all retirement benefits, all disability payments, and all death benefits, to which such peace officer or his beneficiaries would have been otherwise entitled to under provisions of this Act * * *

(b) Any member or official of the Peace Officers Annuity and Benefit Fund or any other aggrieved person who may desire to institute charges against any member of the said Fund under this Section shall do so by filing written charges with the Board, which charges must be filed within six months from the date of the alleged dereliction; thereupon the Board shall serve upon any member a statement of the charges against him and notice of a hearing thereon to be heard at a time and place fixed in said notice, which shall be not less than ten (10) days after the date of service thereof. Such member shall have an opportunity to appear, be heard, and present

ing law enforcement officers who did not oppose national policy and constitutional mandates was approved by the House by a vote of 125-1. Nine of the members who voted yes on this bill also voted to prevent Julian Bond from taking his seat.[6]

The 1956 session of the Georgia General Assembly included in the general appropriations act a provision requiring that appropriations for public education be limited exclusively to those districts maintaining segregated schools. Even if a court of law declared this provision unconstitutional and required desegregation in a given school district, state officials would nonetheless "have no power to make any apportionment for the benefit of any of the public

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(Footnote 5 continued)

his defense. . . . If after such hearing the Board shall determine that such member has knowingly failed or refused to attempt to enforce any law of this State requiring segregation or separation of the white and colored races in any manner or activity or that such member has failed to take any necessary or appropriate action for such enforcement thereof, the Board shall order all retirement benefits, all disability payments, all death benefits and any other benefits to which such member or his beneficiaries may or would have been entitled to under the provisions of this Act or any amendments hereinafter made thereto forfeited. The decision of the Board shall be final."

[6] The nine representatives voting in favor of the act, and voting not to seat Bond, are:

Mac Barber	Emory L. Rowland
J. Lucius Black	George L. Smith II
J. Roy McCracken	Joe C. Underwood
Chappelle Matthews	W. M. "Bill" Williams
Tom C. Palmer, Jr.	

See House *Journal*, Georgia General Assembly, Regular Session, 1956, pp. 1374-1375, for roll-call vote in Act No. 197.

schools within such school district. . . ."[7] This require-

[7] Excerpts from the General Appropriation Act for the fiscal year 1957 of the General Assembly of Georgia (HR 243) as reprinted in 1 Race Rel. L. Rep. 421-422 (1956):

* * *

Section 7

* * *

Provided, further, that (a) the appropriations made in this section for the benefit of public schools are limited to the public schools within such school districts as shall provide separate schools for white and colored children throughout the entire district, and as is provided by Article VIII, Section I, Paragraph I of the Constitution of this State, and in which all the white and colored children attending public schools shall attend separate schools, the General Assembly declining to make any appropriation for the benefit of any other public schools. Funds apportioned or made available under this Section 7 for the benefit of the public schools within any school district shall be deemed to be separately appropriated to the public schools within such school district, and shall be separately subject to the limitation imposed by this subsection upon their use, which limitation shall be deemed to be a condition precedent to such appropriation. In any of the events provided by subsection (d) hereof said appropriation shall be null and void.

* * *

(d) In the event of the prosecution to effective judgment of a suit in respect of any public school district resulting in determination by a court of competent jurisdiction that any portion of this Section 7 is unconstitutional, or that the public authorities in charge of the public schools within such district may not provide separate schools for the white and colored races within such school district as is required by Article VIII, Section I, Paragraph I of the Constitution of this State, and in the manner provided by subsection (a) hereof, the State Board of Education shall have no power to make any apportionment for the benefit of any of the public schools within such school district, and the State Budget Authorities shall have no power to make any part of the appropriation provided in this Section 7 or any other funds available to or for the benefit of such public schools; and if such effective judgment shall occur after apportionment made to such public schools by the State Board of Education and order of the State Budget Authorities approving the same, no further funds from such apportionment to such public schools shall be paid by any officer of this State. The Governor

ment that state officials oppose national policy even to the

(Footnote 7 continued)

shall by written order determine when any such judgment has become effective.

* * *

Section 8

* * *

Provided, further, that (a) the appropriations made in this Section 8 for the benefit of the State Board of Regents and the University System or otherwise, so far as the same relate to schools and colleges, are limited to schools and colleges providing separate education for the white and colored races, and operating in conformity to Article VIII, Section I, Paragraph I of the Constitution of this State, the General Assembly declining to appropriate funds for any school or college operating otherwise. Funds apportioned or made available under this Section 8 for the benefit of any school or college shall be deemed to be separately appropriated for the benefit of such school or college, and shall be separately subject to the limitation imposed by this subsection upon their use, which limitation shall be deemed to be a condition precedent to such appropriation. In any of the events provided by subsection (d) said appropriation shall be null and void. Schools and colleges as used in this Section 8 shall include branches, departments and institutions of the University System, whether located at the State University at Athens or elsewhere, such as the School of Law, the School of Education, the School of Dentistry, the School of Medicine, each of which shall be deemed to be a separate school or college.

* * *

(d) In the event any suit is prosecuted to effective judgment of a court of competent jurisdiction against the State Board of Regents or other authorities in charge of any school or college to which this Section 8 relates or in relation to any such school or college, resulting in determination by such court that any provision of said Section 8 is unconstitutional, or that any such school or college may not be operated in conformity to Article VIII, Section I, Paragraph I of the Constitution of this State, and as provided in subsection (a) hereof, or requiring the admission to such school or college of any person denied admission by the authorities in charge thereof, the school or college affected by such judgment shall not thereafter be included in any apportionment of the State Board of Regents nor in any order of the State Budget Authorities making funds available. If such effective judgment shall be rendered in respect of any school

point of defiance of state and federal court orders was passed with the aid of the votes of 14 representatives who later voted to prevent Julian Bond from taking his seat in the House.[8] Earlier in the 1956 session, the House had approved a similar funds-cutting proposal by a 116-0 vote, but no roll-call vote was recorded.[9]

In 1959, the Georgia House passed an act prohibiting a municipality from collecting taxes for the support of a school system under court order to desegregate.[10] This bill denying local government the right to provide financial support for its schools because these schools were under court order to comply with the United States Constitution was approved by a 132-2 vote in the House. Voting with

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(Footnote 7 continued)

or college to which this Section 8 relates after an apportionment shall have been made thereto and funds made available to such school or college by the Budget Authorities, then and in such event no further funds shall be used or expended from such apportionment and the unexpended portion thereof shall be retained in the treasury. The Bureau of the Budget shall by written order determine when any such judgment has become effective.

* * *

[8] The 14 representatives voting in favor of this provision, and voting not to seat Bond, are:

George T. Bagby	J. Roy McCracken
Mac Barber	Glenn S. Phillips
J. Lucius Black	Mac Pickard
Johnnie L. Caldwell	Emory L. Rowland
James H. Floyd	George L. Smith, II
A. T. Land, Sr.	Joe C. Underwood
Chappelle Matthews	W. M. "Bill" Williams

See House *Journal*, Georgia General Assembly, Regular session, 1956, pp. 789-790.

[9] See the House *Journal*, Georgia General Assembly, Regular Session, 1956, p. 745.

[10] See House *Journal*, Georgia General Assembly, Regular Session, 1959, pp. 413-414 for text of the legislation.

the majority were 32 representatives who also voted to refuse to seat appellant Bond.[11]

In 1960, the Georgia House enacted Act 1504 amending the 1959 law just discussed. This amendment also required that the taxing power of a municipality "shall immediately terminate and cease" in the event of school desegregation in the municipality. This law was approved by a unanimous vote.[12] The House *Journal* does not

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[11] The 32 representatives voting in favor of H.B. 5 in 1959 and voting not to seat Bond, are:

George T. Bagby	Quimby Melton, Jr.
Mac Barber	David L. Newton
J. Lucius Black	Colquitt H. Odom
J. O. Brackin	Tom C. Palmer, Jr.
George D. Busbee	James W. Paris
Johnnie L. Caldwell	H. Walstein Parker
Philip M. Chandler	Glen S. Phillips
Jimmy Conner	Mac Pickard
James H. Floyd	Emory L. Rowland
Maddox J. Hale	J. R. Smith
Thomas T. Irvin	Virgil T. Smith
W. Harvey Jordan	William Burton Steis
Sidney Lowrey	Earl P. Story
Chappelle Matthews	Joe C. Underwood
Dorsey R. Matthews	George J. Williams
J. Roy McCracken	W. M. "Bill" Williams

See House *Journal*, Georgia General Assembly, Regular Session, 1959, pp. 413-414, for roll-call vote on the tax prohibition measure.

[12] Text of Act 504, 1960 Session, General Assembly of Georgia, as reprinted in 5 Race Rel. L. Rep. 520-521 reads in part (1960):

* * *

"Section 2. The authority hereby conferred upon municipal corporations to levy taxes may be exercised only for the purpose of levying such taxes for the support of separate public schools for the white and colored races. Whenever any public school system operated by any municipal corporation of this State shall admit any member of the colored race to any school maintained by said school system for members of the white race, or shall admit any member of the white race to any school maintained by said school system for

record a roll-call vote, but 41 legislators in the House at the time it approved the measure without a dissenting

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(Footnote 12 continued)

members of the colored race, or shall otherwise admit members of the white and colored races to the same school, then all power conferred upon any such municipal corporation by this Act shall immediately terminate and cease to be effective and no such municipal corporation shall thereafter have power or authority to levy any tax, ad valorem or otherwise, for the support and maintenance of public schools; and the Superior Court of the county shall have jurisdiction to enjoin any attempt to exercise any such power at the suit of any taxpayer of the municipality; provided, however, that the closing of any public school within such municipality by authority of State law shall not prevent the exercise of the power of taxation conferred by this Act for the support of public schools thereafter continued in operation as separate public schools for the white and colored races. Notwithstanding anything to the contrary in any section of this Act as amended, each municipal corporation, having an independent or public school system as referred to in section 1 hereof, shall have the power to and may levy and collect any tax, the lien of which attached prior to the admission of one or more members of both white and colored races to the same public school maintained by such municipal corporation, and the proceeds of said tax may be used for the support of any public school in said system until one or more members of both the white and colored races are admitted to that public school, or to satisfy indebtedness incurred to provide funds for the support of public schools in said system, which indebtedness was incurred prior to the admission of members of both the colored and white races to any one public school in said system. The certificate of the person or persons authorized to borrow money on behalf of any such municipal corporation shall be conclusive for the purposes of the preceding sentence as to the fact that no members of both the white and colored races have been admitted to any one public school in said system prior to the time of the making of any such loan." * * *

vote were also in the House in 1966 when Julian Bond was denied his seat.[18]

There are numerous examples of individual legislators who expressed public and vigorous opposition to this Court's rulings on desegregation and who not only took

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[18] The 41 representatives (a) in the House in 1960, and (b) voting not to seat Bond, are below:

George T. Bagby
Mac Barber
J. Lucius Black
D. B. Blalock
J. O. Brackin
George D. Busbee
Johnnie L. Caldwell
Philip M. Chandler
Jimmy Conner
A.B.C. (Brad) Dorminy
William M. Fleming, Jr.
James H. Floyd
Maddox J. Hale
Thomas T. Irvin
W. Harvey Jordan
William J. (Bill) Lee
W. Herschel Lovett
Sidney Lowrey
Chappelle Matthews
Dorsey R. Matthews
J. Roy McCracken
Quimby Melton, Jr.
Jimmy D. NeSmith
David L. Newton
Colquitt H. Odom
Tom C. Palmer, Jr.
James W. Paris
H. Walstein Parker
Glen S. Phillips
Mac Pickard
Ben B. Ross
Emory L. Rowland
George L. Smith II
J. R. Smith
Virgil T. Smith
William Burton Steis
Earl P. Story
Joe C. Underwood
Hubert H. Wells
George J. Williams
W. M. "Bill" Williams

All members in the House did not vote for Act 504 but no vote in opposition was recorded.

their seats without challenge in 1966, but who also voted not to seat Julian Bond.[14] Specifically, Howard T. Overby of Gainesville (along with numerous public leaders in Georgia state government including the governor, lieutenant governor, attorney general, etc.) was one of the early organizers of the States Rights Council of Georgia, Inc., a White Citizens' Council-type group which announced as its stated purpose a concentrated fight against national policy and this Court's interpretation of the Constitution. (See Atlanta *Constitution*, September 24, 1955.) As a member of the Georgia Senate, Mr. Overby also steered the Interposition Resolution through the upper chamber and co-sponsored the bill mentioned earlier punishing peace officers who did not oppose national desegregation policies. (Atlanta *Constitution*, February 14, 1956; Senate *Journal*, Georgia General Assembly, Regular session, 1956, p. 495.)

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[14] There were twelve votes cast against the resolution not to seat appellant Bond and nine legislators were recorded as not voting. Those recorded as voting nay were:

W. H. (Bill) Alexander	Mrs. Grace Hamilton
Ben D. Brown	John Hood
Rodney M. Cook	Frank R. Lea
J. C. Daugherty	Elliot Levitas
M. J. Egan, Jr.	Kil Townsend
Jack Ethridge	R. H. Walling

Those recorded as not voting were:

Julian Bond	Howard Rainey
T. J. Dillon	Allen B. Smith
J. D. Grier	George T. Smith, Speaker
R. S. Hutchinson	Albert Thompson
D. F. McClatchey	

Of the eight Negro legislators Mrs. Hamilton, Messrs. Alexander Brown, Daugherty and Hood voted against the resolution, and Messrs. Grier, Thompson and the appellant were recorded as not voting. Thus, thirteen white legislators voted in the negative or abstained. The tally was 184 for 12 against and 9 not voting. See House *Journal*, Georgia General Assembly, Regular Session, 1966, p. 45, for roll call vote on H. R. Resolution 19.

Another example is H. Walstein Parker of Sylvania, a member of the Georgia Committee on Schools (Sibley Committee), which in 1960 recommended acceptance of token desegregation rather than closure of the state's public schools. Mr. Parker, however, voted against the Sibley report, joining instead with the committee minority in recommending a continuation of massive resistance to national desegregation policy. (*Report of the Minority,* Committee on Schools, 5 *Race Rel. L. Rep.,* 517-519 (1960). Mr. Parker also voted against the seating of Bond in 1966. Even the attorney for the House in the Bond hearings, Denmark Groover of Bibb County, had been House floor leader for the interposition resolution of 1956. (Atlanta *Constitution,* February 9, 1956.)

Clearly, Julian Bond was hardly alone in the Georgia House in opposing national policy at one time or another. Both individual legislators and the legislature as a whole have openly resisted declared national policy. Such resistance had not heretofore been deemed a disqualification for membership in the legislature, and certainly not when that opposition took the form of white officials condemning a policy requiring the equal treatment of Negroes.

This Court may also take judicial notice that the present Democratic nominee for governor of Georgia is a nationally known, rabid segregationist who, rather than comply with a court order requiring him to serve Negroes in his restaurant pursuant to the Civil Rights Act of 1964, see *Heart of Atlanta Motel* v. *United States,* 379 U. S. 241; *Katzenbach* v. *McClung,* 379 U. S. 294, openly defied the court and, when faced with contempt citation closed his place of business before he would abide by the requirement of equal treatment. *Willis* v. *Pickwick Restaurant,* 234 F. Supp. 179 (N D Ga. 1964). Members of the legislature which denied appellant his seat have now endorsed and are supporting Mr. Maddox's candidacy.

The conclusion is inescapable that the standard applied by the House to bar appellant from taking his seat in the

General Assembly was utilized because of his race and the unpopularity of the views he expressed. As such it constituted a form of racial discrimination offensive to the mandate of the 14th Amendment.

It was pointed out that seven Negroes had been seated and participated fully in the proceeding concerning Mr. Bond both before the committee and on the floor of the House. It is clear, however, that it is no answer to Mr. Bond's assertion of a denial of equal protection that other Negroes were not summarily denied equal protection as well. *Buckner* v. *County School Board of Greene County, Virginia,* 332 F. 2d 452 (4th Cir. 1964); *Downs* v. *Board of Education of Kansas City,* 336 F. 2d 988 (10th Cir. 1964); *Adams* v. *School District Number 5, Orangeburg County, South Carolina,* 232 F. Supp. 692 (E.D.S.C. 1954). Mr. Bond's guarantee of equal protection is personal and present. *McLaurin* v. *Board of Regents,* 339 U. S. 637.

This action necessarily reveals to Negro legislators that they cannot with impunity dissent from policies and views favored by white legislators and white electors. The standard of ineligibility because of opposition to "national public policy" asserted in this case has been applied only to Mr. Bond and apparently is of force and effect only as needed to punish a Negro legislator who expresses views offensive to the controlling white majority.

Race discrimination cannot be divorced from the legislature's act in this instance. Whatever power the legislature may be able to exercise in this regard, it cannot use that power to effectuate a forbidden discrimination. *Yick Wo* v. *Hopkins,* 118 U. S. 356; *Cooper* v. *Aaron,* 358 U. S. 1. "Acts generally lawful may become unlawful when done to accomplish an unlawful end." *United States* v. *Reading Co.,* 226 U. S. 324, 357. See *Western Union Telegraph Co.* v. *Fortes;* 247 U. S. 105, 114; *Gomillion* v. *Lightfoot,* 364 U. S. 339, 347-348. The inescapable result of the legislature's power utilized here is to subject Negro legislators to tests not required of their white counterparts. This the Fourteenth Amendment forbids.

Appellant Bond has been Denied Constitutionally Guaranteed Rights to Freedom of Speech

The purpose of the First Amendment is to secure unrestricted political discussion of the affairs of the government without fear of punishment. *Cox* v. *Louisiana,* 379 U. S. 536, 552; *Stromberg* v. *California,* 283 U. S. 359; *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 270; *Garrison* v. *State of Louisiana,* 379 U. S. 64. Its mandate is not merely insurance of freedom to express the accepted or the fashionable, but its fundamental purpose is to protect the freedom of those who espouse controversial views on issues of public concern.

In *New York Times* v. *Sullivan,* 376 U. S. 254, 270, this Court stated:

> Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials.

On every public issue there are opponents and proponents with clashing views. In *Thornhill* v. *Alabama,* 310 U. S. 88, 95, this Court stated:

> Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.

In *Terminiello* v. *Chicago,* 337 U. S. 1, 4, it said:

> The vitality of civil and political institutions in our society depends on free discussion . . . it is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful exchange is effected.
>
> Accordingly the function of free speech under our system of government is to invite dispute. It may

> indeed serve its high purpose when it induces a condition of unrest, creates dissatisfactions with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea, freedom of speech, though not absolute is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantial evil that arises far above public inconvenience, annoyance and unrest. There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts or dominant political or community groups.

Appellant's statement was obviously not liked by his fellow members of the House and caused resentment, consternation and genuine concern, particularly since the SNCC declaration appellant endorsed had aligned the Negro's struggle here in the United States with opposition to the war in Viet Nam. Neither consternation, resentment nor concern, however, constitute a justifiable basis for governmental intrusion in the protected area of free speech.

When dealing with utterances that create public controversy and threaten to cause breaches of the peace, this Court has at times used the "clear and present danger" test to determine the permissible limits the Constitution affords the exercise of free speech rights where it impinges on state power to maintain peace and order.

The "clear and present danger" test as first proclaimed in *Schenck* v. *United States,* 249 U. S. 47, 52, was stated in these terms:

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.

In *Bridges* v. *California,* 314 U. S. 252, 262, 263, this Court restated the formula in an even more stringent format:

> . . . the likelihood, however great that a substantive evil will result cannot alone justify a restriction upon freedom of speech or the press. The evil itself must be "substantial," . . . even the expression of "legislative preferences or beliefs" cannot transform minor matters of public inconvenience or annoyance into substantive evils of sufficient weight to warrant the curtailment of liberty of expression.

Mr. Bond is not alone in opposing the Viet Nam war. There is a fierce debate throughout the country about our involvement in that conflict. Some of our most respected public officials in the highest circles of our government have voiced bitter opposition to our presence there. No present threat to our territorial integrity or the perdurance of our democratic institutions has yet been revealed. Despite appellant's encouragement of draftees to refuse to serve, there is no showing it had any adverse effect on the nation's war effort. Thus, applying the "clear and present danger" test to the statements made and the surrounding circumstances, there would appear to be no warrant for the punitive action taken.

Moreover, there is absent here any compelling justification in the form of a subordinating state interest pursuant to which governmental interference otherwise forbidden might be allowed. See *Sweezy* v. *New Hampshire,* 354 U. S. 234; *Weiman* v. *Updegraff,* 344 U. S. 148. No important state interest is being served by refusing to allow appellant to take his proper place as a member of the House. See *Pennsylvania* v. *Nelson,* 350 U. S. 497. Under this yardstick, the action of the House is at war with the Constitution's command.

Pursuant to whatever criteria the constitutional guaranty of free speech is measured, the denial by the members

of the House to appellant of his rightful seat because of disagreement with views he expressed as to this nation's involvement in Viet Nam constitutes a forbidden intrusion of the exercise of First Amendment rights secured against state intrusion under the 14th Amendment.

The Action of the Georgia House of Representatives in Refusing to Seat Julian Bond Not Only Impairs Appellant's Rights but Constitutes a Deprivation of the Franchise Rights of Qualified Voters in House District No. 136 As Well, In Violation of the Mandates of the Fourteenth and Fifteenth Amendments

This Court in a long series of cases has struck down a great variety of attempts to deny the right of suffrage to Negro citizenry. *Guinn* v. *United States,* 238 U. S. 347; *Myers* v. *Anderson,* 238 U. S. 368; *Nixon* v. *Herndon,* 273 U. S. 536; *Lane* v. *Wilson,* 307 U. S. 268; *Smith* v. *Allwight,* 321 U. S. 649; *Nixon* v. *Condon,* 286 U. S. 573; *Terry* v. *Adams,* 345 U. S. 461; *United States* v. *Thomas,* 362 U. S. 58; *Gomillion* v. *Lightfoot,* 364 U. S. 339; *Schnell* v. *Davis,* 336 U. S. 933; *Alabama* v. *United States,* 371 U. S. 37; *Louisiana* v. *United States,* 380 U. S. 145; *United States* v. *Mississippi,* 380 U. S. 128. The form of the discrimination is unconsequential. If it results in depriving Negro citizens of the right to vote, the Fifteenth Amendment's guarantee has been violated. See *South Carolina* v. *Katzenbach,* 382 U. S. 898. As was stated in *Lane* v. *Wilson,* at page 275:

> The reach of the Fifteenth Amendment against contrivances by a state to thwart equality in the enjoyment of the right to vote by citizens of the United States regardless of race or color, has been amply expounded by prior decisions. . . . The Amendment nullifies sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race.

Negro citizens of the 136th House District of Georgia may not be denied participation in the electoral process. Their rights to an unfettered and free choice of the person they desire to represent them in the state legislature are unquestioned. This Court noted in *Gomillion* v. *Lightfoot,* at 345-346:

> The opposite conclusion, urged upon us by respondents, would sanction the achievement by a State of any impairment of voting rights whatever so long as it was cloaked in the garb of the realignment of political subdivisions. "It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."
>
> • • •
>
> The petitioners here complain that affirmative legislative action deprives them of their votes and the consequent advantages that the ballot affords. When a legislature thus singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment.

The above rationale is apposite here. By the action being contested in this case, white members of the House of Representatives of the General Assembly established new and different criteria as a prerequisite for the right to represent the electors of the 136th House District than had heretofore been applicable to any other duly elected member of the House from any other district. The rights of electors of appellant Bond's district to vote and to choose their own representative have been unconstitutionally impaired, as in *Lane* v. *Wilson, supra, Gomillion* v. *Lightfoot, supra,* and cognate cases. In effect the State of Georgia through the action of the House of Representatives has put its Negro citizens on notice that of the Negro legislators they help to elect, only those who are careful in not publicly asserting views and positions offensive to the white legislators will be allowed to qualify to sit in the General Assembly. This creates in effect a prior restraint upon

the free exercise of the right to vote. Cf. *Cox* v. *Louisiana*, 379 U. S. 559; *Winters* v. *New York*, 333 U. S. 507; *Saia* v. *New York*, 334 U. S. 558.

While the Fifteenth Amendment guarantees exercise of rights of suffrage against restrictions of race and color, the equal protection clause of the Fourteenth Amendment is a guarantee against the dilution or diminution of the voting rights of some citizens as compared with that of others. The two constitutional provisions, therefore, more than guarantee the right to cast a ballot free of discrimination. *South* v. *Peters*, 339 U. S. 276 (Douglas, *J.*, dissenting). They protect against any unwarranted intrusion upon the right to vote which would impair, diminish or render meaningless exercise of suffrage rights which are the birthright of all our citizens. As this Court stated in *Wesberry* v. *Sanders*, 376 U. S. 1, 17-18:

> No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.

And in *Reynolds* v. *Sims*, 377 U. S. 533, 561, 562:

> . . . Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.
>
> • • •
>
> As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system.

The right to vote is given full protection under the Constitution in order that its exercise may be truly free and untrammeled. As Mr. Chief Justice Warren said in *Reynolds* v. *Sims* at pages 554-555:

> . . . It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote, *Ex parte Yarbrough*, 110 U. S. 651 . . . and to have their votes counted, *United States* v. *Mosley*, 238 U. S. 383 . . . In Mosley, the Court stated that it is "as equally unquestionable that the right to have one's vote counted is as open to protection . . . as the right to put a ballot in a box." 238 U. S., at 386 . . . The right to vote can neither be denied outright, *Guinn* v. *United States*, 238 U. S. 347 . . . *Lane* v. *Wilson*, 307 U. S. 268 . . . nor destroyed by alteration of ballots, see *United States* v. *Classic*, 313 U. S. 399 . . . nor diluted by ballot-box stuffing, *Ex parte Siebold*, 100 U. S. 371 . . . *United States* v. *Saylor*, 322 U. S. 385 . . . As this Court stated in *Classic*, "Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted . . ." 313 U. S. at 315 . . . Racially based gerrymandering, *Gomillion* v. *Lightfoot* . . . and the conducting of white primaries, *Nixon* v. *Herndon* . . . *Nixon* v. *Condon* . . . *Smith* v. *Allwright* . . . *Terry* v. *Adams* . . . both of which result in denying to some citizens their right to vote, have been held to be constitutionally impermissible. And history has seen a continuing expansion of the scope of the right of suffrage in this country. The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.

In subsequent litigation this Court has struck down a variety of reapportionment plans because it could discover no rational state interest to justify a deviation from the one man, one vote rule. Among the factors held insufficient justification for a state to deny numerical equality of

representation to its citizens are: a state's heterogeneous characteristics, *Lucas* v. *Forty-Fourth General Assembly*, 377 U. S. 713; balancing urban and rural power, *Davis* v. *Mann*, 377 U. S. 678; representation for sparsely settled areas, *W.M.C.A.* v. *Lomenzo*, 377 U. S. 633; protecting insular minorities, *Lucas* v. *Forty-Fourth General Assembly*, 377 U. S. 713; preventing overly large districts and representation of economic or group interests, *Reynolds* v. *Sims, supra;* geographical or topographical considerations, *W.M.C.A.* v. *Lomenzo, supra;* permanent or temporary residence, *Davis* v. *Mann, supra;* the history or tradition of a state. *Maryland Committee for Fair Representation* v. *Tawes*, 377 U. S. 656; approval by electorate, *Lucas* v. *Forty-Fourth General Assembly, supra;* state constitutional requirements, *W.M.C.A.* v. *Lomenzo, supra;* federal analogy, *Maryland Committee for Fair Representation* v. *Tawes, supra;* and an electoral college analogy, *Reynolds* v. *Sims, supra.*

The state interest sought to be protected is the right to require the unflagging loyalty of its officials to the support of national policy. But history demonstrates that such an interest, if it exists, was only asserted in this case. Where national policy has mandated freedom and equality without regard to considerations of color, legislators have been allowed to flaunt it with impunity. Here, however, appellant took a stand opposed by his white colleagues, and even though the views he expressed were endorsed in subsequent re-election on two occasions, the state asserts an overriding interest to deny him the right to a seat in the House of Representatives.

It is respectfully submitted that the constituents of the 136th House District have thereby been deprived of the right to cast an effective vote and denied the equal protection of the laws. These rights of his constituents may be properly asserted in this cause by appellant Bond. *NAACP* v. *Alabama*, 357 U. S. 449.

CONCLUSION

For the foregoing reasons and for the reasons set forth in appellants' brief, it is respectfully submitted that the judgment of the court below should be reversed.

ROBERT L. CARTER,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 87

JULIAN BOND, DR. MARTIN LUTHER KING, JR., and MRS. AREL KEYES,

Appellants,

—v.—

JAMES "SLOPPY" FLOYD, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF GEORGIA, *AMICI CURIAE*

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Interest of *Amici*

The American Civil Liberties Union and the American Civil Liberties Union of Georgia, which file this brief with the consent of the parties, believe that the case at bar raises fundamental First Amendment questions. The central issue is whether a duly elected representative to a state legislature may be barred from taking his seat solely because his views on issues of public importance are incompatible with the views held by a majority of the legislature.

For the reasons set forth in this brief, we believe the Court should clarify the importance of free speech for public officials.

Statement of the Case[1]

On June 16, 1965, at a special election called pursuant to a re-apportionment decision of the court below (*Toombs* v. *Fortson*, 241 F. Supp. 65), the appellant Julian Bond, a Negro, was elected to the Georgia House of Representatives by a vote of 2,320 to 487, or 82% of the total votes cast (R. 4). Mr. Bond would ordinarily have taken his seat on January 10, 1966, the opening day of the regular legislative session following the special election (R. 133).

On January 6, 1966, the Student Non-Violent Coordinating Committee (SNCC), a militant civil rights organization of which appellant was a member and employee, issued a statement relating to United States warfare in Vietnam and civil rights of Negroes. The statement expressed the view that the United States government had been deceptive in claiming concern for the freedom of the Vietnamese people and of colored people around the world and in this country (R. 136). It recounted the violence SNCC workers had experienced in the South and cited the example of Samuel Young, a SNCC worker who "was murdered because United States law is not being enforced" (R. 136). The SNCC statement accused the government of "pursuing an aggressive policy in violation of international law" (R. 136) and questioned the ability and desire of the gov-

[1] The facts are not in dispute in this case. The complaint, the stipulation of the parties, and the factual recitation in the opinion below all agree to the events involved.

ernment to guarantee free elections abroad while civil rights laws were not fully implemented in this country (R. 137). Expressing "sympathy with and support" of those unwilling to respond to the draft, the statement asked, "Where is the draft for the freedom fight in the United States?" (R. 137). The statement concluded with this call:

> We therefore encourage those Americans who prefer to use their energy in building democratic forms within this country. We believe that work in the civil rights movement and with other human relations organizations is a valid alternative to the draft. We urge all Americans to seek this alternative, knowing full well that it may cost their lives as painfully as in Vietnam (R. 137).

On the day the statement was issued, Mr. Bond stated in response to questions from a reporter that he concurred in it and that as a pacifist, he was eager to encourage people not to participate in the war in Vietnam for any reason that they might choose (R. 111). He said he felt it to be his responsibility "to oppose things I think are wrong" (R. 112). He felt it was "hypocritical for us to maintain that we are fighting for liberty in other places and we are not guaranteeing liberty to citizens inside the continental United States" (R. 111).[2]

On January 10, 1966, the opening day of the Legislative session, five petitions contesting Representative-Elect

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[2] Appellant's full remarks were recorded on tape by a reporter for an Atlanta radio station. The tapes were admitted into evidence at the proceedings before the Special Committee of the House of Representatives.

Bond's right to be seated were filed by 75 white members of the 205 member Georgia House of Representatives (R. 115). The movement to bar Mr. Bond was based on two of the five petitions filed. The petitions cited Bond for admiring the courage of those who burn their draft cards (R. 13), adhering to and giving aid and comfort to the enemies of the state and the country in violation of the Selective Service law (R. 14), and bringing disrespect on the Georgia House of Representatives (R. 14). They concluded that Bond's statements and actions made it impossible for him to take the oath of office (R. 15, 19).

Mr. Bond testified that he still concurred fully in the statement without reservation (R. 37); that with respect to those who burned draft cards to protest American warfare in Vietnam, he admired people "who feel strongly enough about their convictions to take an action like that knowing the consequences that they will face" (R. 41); and that he "never suggested or counseled or advocated that any other person burn their draft card . . . I do not advocate that people should break laws" (R. 41).

After presentation of the evidence, the Special Committee went into executive session (R. 86) and shortly afterwards on the same day reported its recommendation that Bond not be seated (R. 88). A minority report was also presented (R. 89).

The majority report was adopted by the House by a vote of 184 to 12 (R. 99) and Bond was denied his seat.

This suit was filed in the District Court on January 13, 1966. The cause was decided on February 10, 1966, adversely to appellant, Chief Judge Tuttle dissenting. It is reported at 251 F. Supp. 333 (1966).

ARGUMENT

I.

The Court below construed the free speech issue in conflict with principles announced by this Court.

The central issue in this case is whether an elected representative can be denied his seat in a state legislature solely because of speech reflecting his political views. Although the court below recognized that "the substantial issue in the case rests on the guarantee of freedom of speech or to dissent under the First Amendment" (*Bond* v. *Floyd,* 251 F. Supp. 333, 339; R. 142), it resolved the free speech issue with a singular disregard for the panoply of safeguards this Court has developed to protect First Amendment freedoms. The majority particularly erred in its application of the separation of powers doctrine to the substantive principles involved.

The foundation of the court's opinion was its view that the resolution of the First Amendment claim "must be in the context of two fundamental principles of government: separation of powers and state government under our system of federalism." *Ibid.* Proceeding from that premise, the majority developed a novel version of the balancing test whose ingredients became "the separation of powers principle, a system of federalism and individual rights . . ." (*Id.* at 343; R. 150).[3]

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[3] The majority's consideration of "a system of federalism" to aid in the resolution of the free speech issue was also in error. The majority acknowledged that the separation of powers principle does not apply vertically as between the state and federal governments, but it nonetheless attached some weight to the doctrine by stating that federal rights were subject to "whatever rights were

In developing its test, the majority did not rely on any cases in which this Court applied the balancing test but drew instead from two equal protection cases, *Snowden* v. *Hughes*, 321 U. S. 1 (1944) and *Baker* v. *Carr*, 369 U. S. 186 (1962). The necessity for a showing of "invidious, purposeful discrimination to give rise to relief under the equal protection clause" in these two cases was taken to prescribe "some restraint" in cases involving "state political questions concerning particular offices as distinguished from whole systems such as are prevalent in malapportionment, or racial discrimination" (251 F. Supp. at 343; R. 150).

The majority recognized that if a state legislature were to deny a Negro his seat because of his race, a federal court could properly intervene (*Id.* at 338; R. 139-140). But the court found that where First Amendment rights were at issue, the separation of powers principle was paramount. The result of this theory was to displace the First Amendment from its special position despite delicate treatment of free speech issues in case after case by this Court.

This special treatment has gone beyond the principle that First Amendment freedoms "occupy a preferred position."[4] For example, this Court has developed special

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left by the Fourteenth Amendment to the legislative branch for control of their internal affairs under our system of federalism." (*Id.* at 340; R. 144.) The First and Fourteenth Amendments and the Supremacy Clause forbid the introduction of vague principles of federalism to decide free speech questions.

[4] *Marsh* v. *Alabama*, 326 U. S. 501, 509 (1946); see also *Thomas* v. *Collins*, 323 U. S. 516, 527, n. 12, 530 (1949); *Murdock* v. *Pennsylvania*, 319 U. S. 105, 115 (1943); *Smith* v. *California*, 361 U. S. 147, 169 (1959) (Douglas, J., concurring).

rules limiting the presumption of constitutionality that normally accompanies legislation affecting First Amendment rights,[5] restricting the breadth of legislation touching speech so that only narrowly drawn statutes pass constitutional muster,[6] and forbidding assignment of the burden of proof which results in self-imposed restrictions on speech.[7] Even where First Amendment claims have been defeated, this Court has cautioned that "even harmful conduct cannot justify restrictions upon speech unless substantial interests of society are at stake." *American Communications Association* v. *Douds*, 339 U. S. 382, 397 (1949).

In the face of these cases, among others, the majority's injection of the separation of powers doctrine to limit First Amendment protection is in serious error. The root of this error is the court's assumption that separation of powers is a substantive principle of law which dominates free speech. But the significance of the separation of powers doctrine, on the contrary, stems from its jurisdictional aspect, the question traditionally being which branch of government has jurisdiction or power to proceed in a given area.[8] Thus, "where the Constitution assigns a par-

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[5] *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152, n. 4 (1938). See also *Stromberg* v. *California*, 283 U. S. 359, 369-70 (1931).

[6] *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965); *Cramp* v. *Board of Instruction*, 368 U. S. 278 (1961); *Cantwell* v. *Conn.*, 310 U. S. 296 (1940).

[7] *Speiser* v. *Randall*, 357 U. S. 513 (1958).

[8] Notably, the court below buttressed its reliance on the separation of powers doctrine with precedents announcing the doctrine as a matter of jurisdiction (339 F. Supp. 339-342; R. 141-148). Moreover, the court noted that defendants had raised separation of powers in a jurisdictional context, claiming that the Georgia legislature had "sole and exclusive jurisdiction" (*Id.* at 338; R. 139). Significantly the court rejected defendant's argument, say-

ticular function wholly and indivisibly to another department the federal judiciary does not intervene." *Baker* v. *Carr*, 369 U. S. 186, 246 (1962) (Douglas, *J.*, concurring). But it is altogether novel to assert that the doctrine has substantive aspects in First Amendment cases once the threshold jurisdictional question is settled. Once it is held that an issue is properly before the judiciary rather than another branch of government, the court must then decide the substantive issues at hand.

The separation of powers doctrine has never prevented this Court from extending the protection mandated by the First Amendment. On the contrary, it has consistently recognized that "[t]he ultimate responsibility to define the limits of state power regarding freedom of speech and expression rests with this Court." *Wood* v. *Georgia*, 370 U. S. 375, 386 (1962). *Marbury* v. *Madison*, 5 U. S. (1 Cranch) 137, 177-178 (1803), has for 163 years been the beacon.[9] Especially where First Amendment rights are at stake, a

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ing, "the court has jurisdiction over a denial of First Amendment rights by the state" (*Id.* at 338; R. 140). The majority nonetheless went on to give predominant weight to the separation of powers principle.

[9] The relevant passage reads as follows:

> "It is, emphatically, the province and duty of the judicial department, to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So, if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case, conformable to the law, disregarding the constitution or conformable to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case: this is of the very essence of judicial duty."

See generally, *Baker* v. *Carr*, *supra*, especially pp. 208-229.

retroactive reference to the separation of powers doctrine to resolve the issues is without basis.

II.

The function of free debate, and the special obligation of public officials in a democracy, require explicit recognition of the principle that an elected official cannot be penalized for expression of views which relate solely to a public issue.

In *New York Times* v. *Sullivan,* 376 U. S. 254 (1964), this Court articulated a functional interpretation of the First Amendment which stressed the uses of free speech and the purposes it serves in a democratic society.[10]

> "We consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." 376 U. S. at 270.

Rather than basing its opinion narrowly on one or another of the traditional free speech tests, the Court's functional analysis concentrated on the need for unfettered discussion of public issues and extracted from the First Amendment a " 'central meaning'—a core of protection without which democracy cannot function."[11]

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[10] "[T]he opinion makes a notable shift in constitutional idiom and could provide a new start for consideration of free-speech problems." Kalvan, "The New York Times Case: A Note on 'The Central Meaning of the First Amendment.' " 1964 Sup. Ct. Rev. 191, 194.

[11] Kalvan, *supra,* at 205.

In *New York Times,* the Court went beyond the specific facts of the case and seemed "clearly driven by a concern for the central meaning of the First Amendment," [12] meant to serve on other occasions as well. If "its portend is almost beyond prediction" [13] as a general guide to First Amendment problem-solving, *New York Times* establishes a quite predictable basis for measuring First Amendment protection for those in public life.

The public official rule, like the absolute privileges enjoyed by Congressmen,[14] is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government." *Barr* v. *Matteo,* 360 U. S. 564, 572-573 (1959). The Court in *New York Times* declined to bottom its opinion on abstractions about liberty and freedom but focused pragmatically on the view that democratic governments preserve themselves free from instability and violence by responding to the dialectic of public debate. The necessary participation of public officials in the continuing debate which a democracy must invite, accounts for their special privileges and responsibilities.

This bedrock of policy, based on the necessities of democratic government, guarantees the preservation of free

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[12] *Id.* at 210.

[13] *Id.* at 191.

[14] U. S. Const., Art. I, Para. 6, cl. 1, provides:

"The Senators and Representatives . . . shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; and for any speech and debate in either House, they shall not be questioned in any other place."

See *Kilbourn* v. *Thompson,* 103 U. S. 168 (1888).

speech by insuring it in the public arena where public officials are concerned, quite apart from the law of libel. If protection against defamation can be withdrawn to foster free debate, even when a legislator is falsely maligned, the legislator in turn should enjoy immunity from sanctions of any kind where only public issues are under discussion. As one of the principal draftsmen of the Constitution said:

> "In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of everyone, however powerful, to whom the exercise of that liberty may occasion offense." Works of James Wilson 38 (Andrews ed. 1896).

In *Garrison* v. *Louisiana*, 379 U. S. 64 (1964),[15] and *Rosenblatt* v. *Baer*, 383 U. S. 75 (1966),[16] this Court clarified its concern with the public-debate aspect of *New York Times*. Looking to the necessities of democratic government, the Court in *Garrison* said that, "speech concerning public affairs is more than self expression; it is the essence of self-government" (379 U. S. at 74-75), and concluded that, "The public-official rule protects the paramount public

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[15] *Garrison* put aside the distinction between civil and criminal actions "where criticism of public officials is concerned," pointing out that it is speech, not the form of the remedy which is fundamental.

[16] *Rosenblatt* ruled that a manager of a ski resort was a public official whose actions were subject to the range of criticism afforded by *New York Times*.

interest in a free flow of information to the people concerning public officials, their servants" (*Id.* at 77).[17]

New York Times was not the first case in which the Court emphasized the nexus between First Amendment rights and the function of a particular group in a democratic society. In *Wieman* v. *Updegraff*, 344 U. S. 183, 195 (1952), Justices Frankfurter and Douglas noted that:

> By limiting the power of the States to interfere with freedom of speech and freedom of inquiry and freedom of association, the Fourteenth Amendment protects all persons, no matter what their calling. But, in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers, brings the safeguards of those amendments vividly into operation. Such unwarranted inhibition upon the free spirit of teachers . . . has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice.[18]

The special function of teachers as recognized in *Sweezy* has its counterpart in the special responsibility of pub-

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[17] See also *Rosenblatt* v. *Baer*, 383 U. S. at 85. The majority opinion in *New York Times* left open the question of the breadth of the public official category. 376 U.S. at 283, n. 23. *Rosenblatt*, however, suggests that one who has "thrust himself into the vortex of the discussion of a question of pressing public concern" may bring himself within the public official rule. *Id.* at 86, n. 12. See also Comment, "The Scope of First Amendment Protection from Good Faith Defamatory Error," 75 Yale L. J. 642 (1966).

[18] See also *Shelton* v. *Tucker*, 364 U. S. 479 (1960); *Sweezy* v. *New Hampshire*, 354 U. S. 234 (1957).

lic officials as elucidated in *New York Times.* Both teachers and public officials owe large duties to society which require that the channel between them and the public be unobstructed. *Sweezy* and *New York Times* provide the basis for a ruling that public officials cannot be penalized for statements relating solely to public issues.

The Speech and Debate Clause of the Constitution, though limited to congressional floor debate, and the cases interpreting the clause, further emphasize the special importance of free speech for legislators. In *United States* v. *Johnson,* 383 U. S. 169 (1966), this Court expressly recognized that the First Amendment and the Speech and Debate Clause serve the same purposes and, citing *New York Times,*[19] adopted the functional approach in looking "particularly to the prophylactic purposes of the clause." 383 U. S. at 182. While recognizing the peculiar history attached to the Speech and Debate Clause,[20] this Court noted its necessary connection to "the central importance to our political system of uninhibited political expression as guaranteed to the general populace by the First and Fourteenth Amendments." 383 U. S. at 182, n. 12.

The Speech and Debate clause has been expansively interpreted by this and other courts.[21] In *Coffin* v. *Coffin,* 4

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[19] 383 U. S. at 182, n. 12.

[20] *Id.* at 182-183.

[21] Art. I, Sec. 6, cl. 1, was taken directly from English law, and was approved without discussion or opposition. See 5 Elliot's Debate 406 (1836 ed.). The leading English cases, *Stockdale* v. *Hansard,* 9 Ad. & E. 1, 122 Eng. Rep. 1112 (Q. B. 1939), and *Ex parte Watson,* 4 Q. B. 573 (1869), construed the privilege broadly. *Ex parte Watson, supra,* cited by both the circuit court and the Supreme Court in *United States* v. *Johnson, supra,* declared that for "speeches made in Parliament by a member to the prejudice of any other person, or hazardous to the public peace, the member enjoys complete immunity." *Ex parte Watson* at 1156.

Mass. 1 (1808), the Massachusetts Supreme Court viewed the State's speech and debate privilege as embracing "every .... act resulting from the nature, and in the execution, of the legislator's office." *Id.* at 27. Adopting the language of the Massachusetts case, this Court in *Kilbourn* v. *Thompson*, 103 U. S. 168 (1888), held that a legislator could not be sued for false imprisonment for issuing a report or for voting for a resolution.[22] Assuring that the immunity afforded would be absolute, *Cochran* v. *Couzens*, 42 F. 2d 783 (D. C. Cir. 1930), cert. denied, 282 U. S. 874 (1930), held that the privilege protected against maliciousness even if the disputed words were not pertinent to the subject before the legislature. Finally, *United States* v. *Johnson, supra*, found the Speech and Debate Clause a bar to a criminal prosecution for bribery against a congressman who was charged with delivering a speech on the floor as part of an illegal scheme.[23]

The strong presumption in favor of unlimited legislative speech suggests that its purposes do not end at the door of the legislative chamber. *Barr* v. *Matteo, supra*, although drawing sustenance from the Speech and Debate Clause,[24] concerned not a legislator but an acting director of the Office of Rent Stabilization, who was sued for libel for issuing a press release announcing his intention to suspend certain employees. Despite an allegation of malice, this

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[22] In a particularly broad interpretation, the clause was held to go beyond "words spoken in debate" to cover anything "generally done in a session of the House by one of its members in relation to the business of the House." 103 U. S. at 204.

[23] This Court rejected the government's attempt to construe the Clause narrowly so as to protect congressmen only against non-criminal actions such as libel. 383 U. S. at 182-183.

[24] 360 U. S. at 569, n. 6.

Court held that the press release was absolutely privileged. Even though the issuance of press releases was outside of those duties required by law of the official, the Court looked to the "reasons which underlie the recognition of the privilege" and concluded that when officials " . . . speak out . . . in respect to matters of public interest and concern," they must be protected "not for their private indulgence but for the public good." 360 U. S. at 575. *Barr* v. *Matteo,* like *New York Times* "confirm[s] the proposition that the Court is carried along by a momentum of insight about the democratic necessities of free speech." [25]

Barr v. *Matteo* was also cited in *New York Times* to emphasize the importance of reciprocity of protection where free speech is concerned.[26] Paradoxically, however, though appellant was penalized (as were his constituents) by exclusion from the state legislature, the State is without power to punish in any way the original authors of the statement in issue. Thus, the State has been able to penalize appellant only because he was a publicly elected official. Despite special protection afforded public debate on "matters of the highest public interest and concern" (*New York Times* v. *Sullivan, supra,* at 266) and the important role of the public official in that debate, appellant has incurred the special penalty of exclusion from the legislature as punishment, rather than the special privileges associated with free speech and public office.

The penalty of exclusion from the state legislature, moreover, cannot be justified on the basis of the content of the

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[25] Kalvan, *supra,* at 209.

[26] "It would give public servants an unjustified preference over the public they serve, if critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves." 376 U. S. at 282-283.

SNCC statement. The court below referred to the statement as being "at war with the national policy of this country" and "a call to action based on race." Going even further, in a remarkable passage, the majority outlined the various elements of that "national policy," as if there were or should be general agreement concerning them. It seems clear that both the majority below and the Georgia legislature were moved to the decision excluding appellant because of the views expressed in the SNCC statement. This is especially clear in the case of the Georgia legislature, which found the entire statement relevant in denying appellant the right to take the oath (R. 88).

Despite the majority's extensive analysis of the statement and its distaste for the views expressed, the court claimed to rest its decision on those parts of the SNCC statement "freighted with racial overtones and . . . at variance with the established national concept of [the] country . . . only insofar as it relates to the call not to support the Selective Service System" (251 F. Supp. at 345, R. 153).[27] Even if the court's opinion revealed so carefully drawn a distinction between different levels of advocacy, the SNCC statement would be protected by the First Amendment.

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[27] The majority opinion, in basing its decision on the "call to action," erroneously cited that part of the SNCC statement expressing support for those who refuse the draft (251 F. Supp. at 344, R. 152). This statement of "sympathy . . . and support" is no more an illegal call to action than would be an expression of sympathy and support for murderers, robbers, or revolutionaries. Sympathy for lawbreakers is not advocacy of their conduct. The only portion of the SNCC statement advocating action is the last paragraph (R. 187), which urges Americans to seek to make civil rights work an alternative to the draft. This is a classic advocacy of a change in the law. Compare the advocacy at issue in *Taylor v. Mississippi*, 319 U. S. 583, discussed *infra*.

Although the SNCC statement does not advocate illegal action, it would be protected under this Court's decisions if it did. *Kingsley Picture Corp.* v. *Regents,* 360 U. S. 684, 689 (1959) emphasizes that advocacy of illegal conduct (there, adultery) enjoys constitutional protection:

> "Advocacy of conduct proscribed by law is not, as Mr. Justice Brandeis long ago pointed out, 'a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on.' *Whitney* v. *California,* 274 U. S. 357, at 376 (concurring opinion). 'Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgement of the rights of free speech.' Id. at 378."

Even before *Kingsley,* this Court had dealt with the more serious question at issue here of advocacy of opposition to war.[28] Significantly, the clear and present danger

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[28] This Court has been especially wary of restrictions on the discussion of subjects of current controversy and interest, including war. See *Taylor* v. *Mississippi,* 319 U. S. 583 (1943). Each period has its volatile public debate which can erupt into public disorder and which seems destructive of values deeply held at the moment. In the 1930's, the rights of employers and workers was such an issue, but this Court affirmed the right to picket declaring:

> "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill* v. *Alabama,* 310 U. S. 88, 102 (1940).

See also *N. L. R. B.* v. *Ford Motor Co.,* 14 F. 2d 905 (6th Cir. 1940), cert. den. 312 U. S. 689, allowing employers the corollary right to distribute statements disparaging labor unions.

When the country had just completed a war in which racism was one of the agitating issues, a street speaker won First Amendment

test developed by this Court was born in time of war. Justice Holmes, who wrote the majority opinion curtailing speech in *Schenck* v. *United States*, 249 U. S. 47 (1919), dissented in a war protest case the next year because no clear and present danger had been shown:

> "The power [to punish speech] is undoubtedly greater in time of war than in time of peace because war opens dangers that do not exist at other times.
>
> But, as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same. It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country." *Abrams* v. *United States*, 250 U. S. 616, 627-628 (1920).

This view was adopted in *Taylor* v. *Mississippi*, 319 U. S. 583 (1943), arising out of World War II. Taylor's tract, which was remarkably similar to the SNCC release at issue here,

> "stated it was wrong for our President to send our boys across in uniform to fight our enemies; that it

---

protection for highly unpopular views that struck close at the aroused public disdain for racial and religious bigotry:

> "Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea." *Terminiello* v. *Chicago*, 337 U. S. 1, 4 (1949).

> was wrong to fight out enemies; that these boys were being shot down for no purpose at all; that the two women's sons [who had been killed in battle overseas] may have felt they were doing the right thing to fight our enemies, but it was wrong; that Hitler would rule but would not have to come here to rule." 319 U. S. at 586.

This Court reversed Taylor's conviction for teaching and disseminating literature calculated to encourage disloyalty against the state and national governments, a charge reminiscent of that lodged against appellant here.

Even in the midst of the Civil War when fear of disloyal legislators might be expected to have been most intense, Congressmen were allowed to take their seats despite statements going far beyond appellant's:

> It is noteworthy that although the terms of [the Test Oath Act of July, 1862] included much more than treason, the ironclad oath was not used to bar members for personal disloyalty or passive sympathy with the rebellion, or speeches denouncing the war as an abolition war and opposing any further aid toward its prosecution. Thus, even in the heat of the Civil War, disloyalty was not a bar to an elected member of Congress, until it was expressly made so by a statute, and not then unless it was evidenced by actual aid to the enemy or words of acute virulence. Chafee, *Free Speech in the United States* 263 (1946).

Finally, the case most similar to appellant's was never brought to court. In 1919 the New York legislature refused to seat five socialists because of their political views.[29]

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[29] Chafee, *supra*, pp. 269-282. See also pp. 247-269.

The brief prepared by a distinguished Special Committee of the Bar of the City of New York for presentation to Judiciary Committee of the New York State Assembly supports appellant's position here.[30] The brief very largely used the functional approach adopted by this Court in the *Times* case, as demonstrated by this passage:

> If a majority [of the legislature] can exclude the whole or part of the minority because it deems the political views entertained by them hurtful, then free government is at an end. The rabid free trader for years regarded those who favored a protective tariff as the enemies of the country. The ante-bellum slaveowners considered an abolitionist as a revolutionary (p. 32).

CONCLUSION

The SNCC statement was lawful measured by the standards this Court has recognized. Its similarity to statements by prominent public figures concerning the Vietnam conflict cannot be overlooked.[31] The danger of the majority

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[30] That brief deserves special consideration in light of the eminence of its authors, including a former Chief Justice of this Court, Charles Evans Hughes.

[31] Compare the statements of Senator Wayne Morse:

> [T]here are two tyrannies in a contest for each other. There is the Vietcong, which follows the Communist line; and there is the South Vietnam military tyrant, who follows the line of military fascism—supported, sad to say, by the United States.
>
> We do not have the slightest basis under international law for engaging American boys in a military operation in a civil war in South Vietnam. 110 Cong. Rec. 7927 (1964)
>
> We are pursuing neither law nor peace in southeast Asia. We are not even pursuing freedom. We are maintaining a military dictatorship over the people of South Vietnam, headed by an American puppet to whom we give the orders, and who moves only under our orders. 110 Cong. Rec. 18138 (1964)

opinion below is its failure at this late hour to take into account this Court's long regard for public debate and the special place it has assigned to public officials. The functional approach explicitly adopted in the *Times* case has distinct application where a legislator has been excluded from the legislative forum because of his views, despite his subsequent reelection in two elections. To avoid the threat of enforcement of penalties against a minority member by whim of the majority, we urge this Court to make clear that the first line of defense for the preservation of free speech is in the arena of public debate where public officials must have their say and thus never escape popular judgment.

Respectfully submitted,

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October, 1966

[redacted]

[redacted]

No. 67

JULIAN BOND, *et al.*,

Appellants,

v.

JAMES "SLOPPY" FLOYD, *et al.*,

On Appeal from the United States District Court for the Northern District of Georgia (Atlanta Division)

BRIEF OF AMERICAN JEWISH CONGRESS *AMICUS CURIAE*

[redacted]

Attorneys for American Jewish Congress

[redacted]

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IN THE

Supreme Court of the United States

October Term, 1966

No. 87

JULIAN BOND, *et al.*,

Appellants,

v.

JAMES "SLOPPY" FLOYD, *et al.*

On Appeal from the United States District Court for the Northern District of Georgia (Atlanta Division)

BRIEF OF AMERICAN JEWISH CONGRESS *AMICUS CURIAE*

The American Jewish Congress has sought and received the consent of the parties to submit this brief *amicus curiae.*

Statement

In a special election held June 16, 1965, appellant, Julian Bond, having received 82% of the votes cast, was duly elected to the Georgia House of Representatives as the

representative from the 136th House District, Fulton County, Georgia, for the term expiring January 1, 1967 (R. 105-106).* Earlier, Bond had received the Democratic nomination, in a primary election, in which he prevailed over his opponent by a majority of more than 2 to 1 (R. 105-106).

House District 136 was created and the primary and special elections were held pursuant to the order of the court below in *Toombs* v. *Fortson*, 241 F. Supp. 65 (N. D. Ga. 1965), approving on an interim basis a proposed reapportionment of the Georgia Legislature. Bond, the candidates who opposed him in the primary and special elections, and 90% of the registered voters in the 136th District are Negroes (R. 105-106).

On January 6, 1966, subsequent to Bond's election, the Student Non-Violating Coordinating Committee, an organization of which Bond was an official, issued a statement (a) criticizing American policy in Vietnam as "undemocratic," "hypocritical" and "aggressive," (b) expressing sympathy with those "unwilling to respond to a military draft" and (c) urging "work in the civil rights movement and with other human relations organizations" as a "valid alternative to the draft" (R. 110-115). Asked subsequently for his views on the burning of draft cards, Bond stated that, although he would not burn his own, he admired the courage of those who did (R. 41).

On January 10, 1966, when the Legislature convened, five petitions contesting Bond's right to be seated were filed

* Numerals in parentheses, preceded by the letter "R." refer to pages of the Record.

by members-elect of the House of Representatives (R. 5). That same day, a hearing before a Special Committee of the House was held in the House chamber, to consider two of these petitions. The essential thrust of both petitions was that, by making the statements described above, Bond had demonstrated that he would not uphold the Constitution of the United States and Georgia, that he therefore was not able in good faith to take the oath of office and that hence he was not qualified to be a member of the Georgia House of Representatives (R. 13-15, 18-21). One of the petitions contended also that, by making those statements, Bond was guilty of treason as well as criminal violations of the Universal Military Training and Service Act (R. 14).

At the hearing, the Special Committee heard evidence of the statements made by Bond, and Bond reiterated and explained his views, as follows (R. 41):

> I have never suggested or counseled or advocated that any one other person burn their draft card. In fact, I have mine in my pocket and will produce it if you wish. I do not advocate that people should break laws. What I simply try to say (sic) was that I admired the courage of someone who could act on his convictions knowing that he faces pretty stiff consequences.

At the same time, he stated his willingness and desire to take the oath of office (R. 23). At the conclusion of the hearing, the Committee recommended to the House and the House by majority vote resolved that Bond should not be allowed to take the oath of office or be seated as a member (R. 26-27).

A few days later Bond, together with the other appellants, Dr. Martin Luther King, a resident but not a reg-

istered voter in House District 136, and Mrs. Arel Keyes, a resident registered voter who voted for Bond in the primary and special elections, commenced this class action for a declaratory judgment and an injunction alleging *inter alia* that, by denying Bond his seat, the Georgia House had deprived Bond, the other appellants and the class they represent of rights guaranteed by the First and Fourteenth Amendments of the United States Constitution and had impaired the constitutional guaranty of a republican form of government, contained in Article IV, Section 4 of the Constitution of the United States (R. 1-13).

A special three-judge court was designated to hear and determine the action (R. 100-101). Defendants moved to dismiss the complaint on the ground that there was no substantial question concerning deprivation of federally protected rights and that the court was therefore without jurisdiction to review the matters in controversy which by state law are vested solely in the Georgia House of Representatives (R. 121-125). This motion was denied (R. 139-140). In addition, the defendants moved to strike Dr. King and Mrs. Keyes as parties plaintiff (R. 102-103). This motion was granted on the ground that they "do not have such a direct interest in the litigation as would give them standing to bring the complaint" (R. 141).

On the merits, the court below dismissed the complaint, Chief Judge Tuttle dissenting. On the issue whether Bond was deprived of his rights under the First Amendment, the majority held that the test to be applied was whether there was "a rational evidentiary basis for the ruling of the House"; i.e., whether there was "any evidence" to sustain the ruling (R. 151). It concluded that Bond's "statements

and affirmation of the SNCC statement as they bore on the functions of the Selective Service System could reasonably be said to be inconsistent with and repugnant to the oath which he was required to take and hence, to provide "a rational basis for the action of the House" (R. 153).

The court below handed down its opinion and order on February 14, 1966. On February 18, 1966, the regular session of the Legislature adjourned (p. 5, Jurisdictional Statement and Motion to Advance). On February 23, 1966, in a new special election called by the Governor, Bond was elected again to represent House District 136, this time without opposition, for the term expiring January 1, 1967. Although the Legislature was not in session, the Rules Committee of the House, after a hearing in which Bond reiterated his earlier views, again prevented him from taking his seat. Finally, on September 14, 1966, Bond won the Democratic primary election held to select the Democratic candidate for representative from House District 136 for the next term (*ibid;* Appellant's Brief, p. 9).

Question to Which This Brief is Addressed

This brief is addressed only to the question whether, when a state legislative body excludes a duly elected member solely because of statements made by him on political issues in public controversy, it

(a) Violates the rights of the member to freedom of speech as guaranteed by the First Amendment of the United States Constitution, as made applicable to the States by the Fourteenth?

(b) Violates the rights of his constituents to equal representation in the legislature, as guaranteed by the Equal Protection Clause of the Fourteenth Amendment?

(c) Violates the guaranty of a republican form of government contained in Article IV, Section 4, of the Constitution?

Interest of the American Jewish Congress

The American Jewish Congress was formed in part to "help secure and maintain the * * * political * * * rights of Jews everywhere" and "to help preserve and extend the democratic way of life." Traditionally, it has demonstrated a special interest in protecting the institutions and instrumentalities of representative self-government against decay from within and attack from without. We believe that this Court's resolution of the issues raised by this appeal and, in particular, of the question to which this brief is addressed, will have significant consequences for our system of representative self-government and for our democratic way of life.

Particularly in the present stage of our country's efforts to solve its agonizing racial difficulties, the action of the Georgia House of Representatives is a matter of the gravest concern. Among both Negroes and whites there are many who have come to doubt whether the "American dilemma" can be solved by orderly constitutional procedures. The American Jewish Congress believes and has urged that, once the right to vote is fully secured by Negroes, they can use it effectively to obtain redress of their

grievances. To tell Negroes today that their votes may be nullified if they use them to elect representatives whose views are offensive to the white majority is to discourage resort to constitutional processes. We should then not be surprised if they resort instead to the methods of violence and revolution.

Argument

In this brief we have elaborated upon a single theme—that a State legislature may not deny a member his legislative seat because of public statements made by him on political issues. We recognize that this case may be disposed of on the basis of other points made by appellant: that the Georgia House of Representatives did not have the power under Georgia law to bar Bond from office; that the oath of office Bond was required to take, as interpreted by the court below, is unconstitutionally vague; that the disqualification of Bond was a bill of attainder and an *ex post facto* law; or that, on the record, there was no rational evidentiary basis for the conclusion of the House that Bond's political statements were inconsistent with his oath of office.

We contend that a disposition of this case on any of these narrow grounds would not decide the fundamental question squarely raised by the record here—whether the results of an election can be set aside by a State legislative body because of its displeasure with the political views of the successful candidate. For example, a legislature might establish a clear statutory rule imposing political qualifications for membership which, if applied prospec-

tively, would survive challenge under the *ex post facto* and other constitutional provisions invoked by appellants. Indeed, in view of the fact that the Georgia House has twice refused to seat Bond, any decision by this Court resting on the absence of State constitutional or legislative authorization would probably be viewed as an invitation to enact appropriate enabling laws.

Since a decision in this case on narrow grounds could so easily be surmounted, we have briefed only the broad issue, in the hope that this Court will reach it squarely and leave no doubt as to the extent of the power of state legislatures to expel or exclude duly elected members.

POINT ONE

The action of the Georgia House of Representatives impaired Bond's freedom of speech in violation of the United States Constitution.

Freedom of speech, guaranteed against federal infringement by the First Amendment and against State infringement by the Due Process Clause of the Fourteenth Amendment, has a preferred place in our constitutional system. When the rights of the people to freedom of expression are limited by legislation, the "usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment." *Thomas* v. *Collins,* 323 U. S. 516, 530 (1945). Freedom of expression is among "those liberties of the individual which history has attested as the indispensable conditions

of an open as against a closed society [and which therefore] come to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." Mr. Justice Frankfurter concurring in *Kovacs* v. *Cooper*, 336 U. S. 77, 95 (1949). "Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions." *Schneider* v. *New Jersey*, 308 U. S. 147, 161 (1939). The "subordinating interest of the State" required to justify restraint on free speech "must be compelling." *Sweezy* v. *New Hampshire*, 354 U. S. 234, 265 (1957); *NAACP* v. *Alabama*, 357 U. S. 449, 463 (1958). For there is "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open." *New York Times* v. *Sullivan*, 376 U. S. 254, 270 (1964). See also *Kingsley Int'l Pictures Corp.* v. *Regents*, 360 U. S. 684, 688-689 (1959).

It should be clearly understood that no suggestion was made by the court below, and it is not now argued, that any of Bond's statements fell outside the area of speech protected by the First Amendment. It is not claimed that he engaged in any illegal conduct, such as direct incitement of forceful overthrow of government. Even accepting the finding of the court below that reasonable men could conclude that Bond's statements were inconsistent with the oath he would have had to take as Representative, they were still constitutionally privileged. Hence, it is not necessary for this Court to consider whether a duly elected

legislator can be barred from taking his seat because the legislature believes, although it has not been proved, that he has engaged in conduct that is, or could constitutionally be made, illegal.

We submit that there can be no governmental interest sufficiently compelling to permit a State legislative body to exclude from its membership a duly elected representative because of his advocacy of any political doctrine or policy, no matter how noxious or repugnant it may be to the views of the legislative majority. The same necessities of self-government which dictate the preferred constitutional position of the citizens' First Amendment rights dictate as well that the legislator's right to speak on all public issues, outside as well as within the legislative chambers, should be free of the kind of restraint the Georgia House of Representatives imposed on Bond.

The simplest meaning of representative self-government is that the people, while retaining their ultimate sovereignty, delegate the tasks of deciding public issues to elected representatives. If a legislative majority be permitted to unseat a minority (whether of one or more) because of the minority's political views, that would be the beginning of the end of representative self-government. For the electorate to choose its legislative representatives intelligently, it must be informed of the candidate's views, particularly on issues which are matters of intense public controversy. Conversely, to persuade the electorate of the wisdom or danger of any public policy, the legislator must advocate his views persuasively to his constituency. Finally, an elected representative, to perform his function ef-

fectively, must constantly seek support not only within the legislative body itself but outside in the court of public opinion. Thus, a legislator who boldly speaks his mind on public issues within or outside the legislative chamber is not merely exercising a protected constitutional right; he is performing a public duty. To deny a duly elected representative his legislative seat because of his public statements on political issues is to abort the essential processes of persuasion and deliberation by which our system of representative self-government achieves its appointed tasks.

Nor is the protection of the First Amendment diminished when a State legislator addresses himself to national rather than state or local issues. The functions and powers of a State legislature are inextricably related to those of the national government. One need only remember that, under Article V of the United States Constitution, a State legislature may propose and must ratify amendments to the Constitution. And a State legislative body may otherwise consider and pass upon questions of national policy and concern. See: Interposition Resolution, approved March 9, 1956 (H. R. 185), Georgia Laws, 1956 Session; Impeachment Resolution, approved February 22, 1957 (H. R. 174), Georgia Laws, 1957 Session.

This Court in the past has acknowledged the necessity of granting legislators an extended range of freedom of political expression. Thus, it has liberally construed Article I, Section 6, Clause 1, of the United States Constitution which provides that Senators and Representatives "shall not be questioned in any other Place * * * for any

speech or debate in either House." *Kilbourn* v. *Thompson*, 103 U. S. 168 (1880). "Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators." *Tenney* v. *Brandhove*, 341 U. S. 367, 377 (1951). See also, *United States* v. *Johnson*, 86 S. Ct. 749 (1965).

Although no similar federal constitutional grant of legislative privilege applies to the states, this Court has said of state elective officials that "the role [they] play in our society makes it all the more imperative that they be allowed to express themselves on matters of current public importance." *Wood* v. *Georgia*, 370 U. S. 375, 395 (1962). Moreover, this Court has suggested that a candidate for state elective office may not be denied a place on the ballot because of his political views. In *Gerende* v. *Board of Supervisors of Elections*, 341 U. S. 56 (1951), a Maryland statute requiring candidates for public office to file an affidavit avowing that they are not "subversive persons" was saved from unconstitutionality by interpreting it to mean that "to obtain a place on a Maryland ballot a candidate need only make oath that he is not a person who is [actually] engaged 'in one way or another in the attempt to overthrow the government by force or violence' and that he is not knowingly a member of an organization engaged in such an attempt." Mere *advocacy* was apparently deemed an insufficient reason to deny a place on the ballot to a candidate for elective office. *A fortiori*, it is an insufficient reason to deny him his legislative seat after he has been duly elected.

We are not suggesting that a state legislature is without constitutional power to regulate the speech or conduct of its members or to enforce such regulation by appropriate sanctions, including expulsion or exclusion. However, such regulation must bear some rational relationship to the orderly conduct of the legislature's business. Thus, the legislature may lay down rules restricting and controlling the time and sequence of legislative debate, applicable to all members regardless of political persuasion. Similarly, the legislature may appropriately insist that certain forms of courtesy and decorum be observed by its members. But, if the great design of the First Amendment—to serve the needs of representative self-government—is to be realized, it surely must be understood to mean that a state legislative body may not expel or exclude a member because of the substance of what he says, at least as long as his statements are constitutionally privileged.

Our recent history is replete with instances in which a legislative majority has erroneously characterized those holding contrary views as treasonable or seditious. Ten years ago, the Georgia House demanded the removal from office of six members of this Court, for "attempting to subvert the Constitution of the United States" and for "giving aid and comfort to the enemies of the United States." H.R. 185, Georgia Laws, 1956 Session. As Alexander Hamilton long ago reminded us, if the legislature "may banish at discretion all those whom particular circumstances render obnoxious without hearing or trial, no man may be safe, nor know when he may be the innocent victim of a prevailing faction. The name of liberty applied to such a government would be a mockery of common sense." Quoted in *United States* v. *Brown*, 381 U. S. 437, 444 (1965).

We are aware that this Court in the past has declined to interfere with legislative bodies in the exercise of their traditional powers to judge the qualifications of state elective officials. *Taylor* v. *Beckman,* 178 U. S. 548 (1900); *Cave* v. *Missouri,* 246 U. S. 650 (1918); *Walton* v. *House of Representatives of the State of Oklahoma,* 265 U. S. 487 (1924); *Snowden* v. *Hughes,* 321 U. S. 1 (1944). While these earlier cases are distinguishable in a number of significant respects from the case at bar, it is sufficient to note here that in not one of them was the claim made that the legislature had impaired the federally protected and preferred right of free speech by depriving an elective official of his public office solely because of public statements made by him on political issues. Moreover, in more recent decisions, this Court has made it clear that state power, even when "acknowledged to be absolute in an isolated context," may not be "used as an instrument for circumventing a federally protected right." *Gomillion* v. *Lightfoot,* 364 U. S. 339, 347 (1960). See also, *Baker* v. *Carr,* 369 U. S. 186 (1962) and *Reynolds* v. *Sims,* 377 U. S. 533 (1964). Contrary to the views of the court below, neither "our system of federalism" nor the doctrine of separation of powers permits the Georgia legislature to ignore the requirements of the First Amendment. *Sweezy* v. *New Hampshire, supra.*

POINT TWO

The action of the Georgia House of Representatives impaired the right of Julian Bond's constituents to be represented in the Georgia Legislature, in violation of the Equal Protection Clause of the Fourteenth Amendment.

By denying Julian Bond his legislative seat, the Georgia Legislature also disenfranchised his constituents in violation of the Equal Protection Clause of the Fourteenth Amendment. "Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in State as well as Federal elections." *Reynolds* v. *Sims,* 377 U. S. 533, 554 (1964). This protection bars not merely state action denying access to the ballot box but also state action which debases or dilutes the weight of a citizen's vote or which effectively nullifies it *Reynolds* v. *Sims, supra; Smith* v. *Allwright,* 321 U. S. 649 (1944); *Terry* v. *Adams,* 345 U. S. 461 (1953).

More particularly, a state violates the Equal Protection Clause if it denies legislative representation to any constituency because of the political views of its residents. *Carrington* v. *Rash,* 380 U. S. 89, 93-94 (1965). We submit that that clause is equally violated if the state accomplishes the same result indirectly by expelling or excluding the duly elected representative of such a constituency.

With these principles in view, consider the realistic posture of the case now before this Court.

Until the reapportionment of the Georgia House of Representatives in 1965, brought about by the decision of

the court below in *Toombs* v. *Fortson*, 241 F. Supp. 65 (N. D. Ga. 1965) (which in turn followed the reapportionment decisions of this Court), Fulton County had three seats in the House. As a consequence of reapportionment, Fulton County gained additional seats, including a seat for the area designated as House District 136, where over 90% of the registered voters are Negro. Bond then won the election in House District 136 by an overpowering majority. However, he was denied his seat because, in the opinion of a majority of the legislature, his expressed political views were inconsistent with the oath of office he was required to take. Bond was then elected again to the same seat for the same term of office after his political views and associations had been widely publicized throughout the State and the country. The Georgia House, acting through its Rules Committee, again refused to allow Bond to take office.

The voters in the 136th House District have thus expressed in no uncertain terms their desire to be represented in the Georgia House of Representatives by Julian Bond. They have thereby endorsed the political philosophy for which he stands. It must be assumed that a majority of the voters in that district share the views expressed by Julian Bond and want them voiced in the House, despite the objections of a majority of that body.

We submit that representation of the people in legislatures, federal, state and local, is not a matter of personalities. The people are called upon in our system of government to vote on the basis of the views that will be expressed and the votes that will be cast by their representatives. It is not enough that some one of their number will

be allowed to sit in the House. He must be one who represents them. The "Representative" who sits in the lower house of the Georgia Legislature represents the *will* of the people, not merely their physical existence.

The Georgia House of Representatives has in effect told the people of the 136th District that they may not be represented at the State Capitol by one who expresses their political wishes. This is to say that they may not be represented at all. Although the House has presumably not barred all residents of the District from participating in its deliberations, it has said that no one representing their viewpoint may do so. This is to disfranchise the electorate.

In the words of Charles Evans Hughes, speaking of the five Socialist members of the New York Assembly excluded from that legislative body in 1920:

> Let every resource of inquiry, of pursuit, of prosecution be employed to ferret out and punish the guilty according to our laws. But I count it a most serious mistake to proceed not against individuals charged with violation of law, but against masses of our citizens combined for political action, by denying them the only resource of peaceful government; that is, action by the ballot box and through duly elected representatives in legislative bodies. Quoted in Chafee, *Free Speech in the United States,* p. 273.

POINT THREE

The action of the Georgia House of Representatives violated the guaranty of a republican form of government contained in Article IV, Section 4, of the Constitution.

The exclusion of Julian Bond from the Georgia House of Representatives, we believe, attacks the very root and foundation of republican government—i.e., the concept that the "Supreme Power resides in the people." *Chisholm* v. *Georgia,* 2 U. S. 419 (1793). We urge, therefore, that this is an appropriate case for this Court to take action under Article IV, Section 4, of the Constitution, which enjoins that "the United States shall guarantee to every State in this Union a Republican Form of Government."

We are aware that ever since *Pacific States Telephone and Telegraph Co.* v. *Oregon,* 223 U. S. 118 (1912) this Court has rejected all claims under the Guarantee Clause on the theory that such claims raise "political questions" which are non-justiciable. We submit, however, that the political question doctrine was misapplied in *Pacific States,* and the cases which followed it, and has no proper application to the case at bar.*

The political question doctrine was first applied to a Guarantee Clause case in *Luther* v. *Borden,* 48 U. S. 1 (1849). In that case, the Court was called upon, after the event, to decide which of two competing governments had been the lawful government of Rhode Island during a pe-

* The argument set forth below is fully developed in Scharpf, *Judicial Review and the Political Question: A Functional Analysis,* 75 Yale L. J. 517, 586-597 (1966).

riod of revolutionary unrest in 1842. The court held that the state courts had decided the issue and that it was bound by that decision. By way of dicta, however, it noted that, to the extent that the Federal Government had any warrant for interfering in such contests, Article IV, Section 4, had delegated this power to Congress: "* * * when the senators and representatives of a State are admitted into the Councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority." 48 U. S. at 42.

This simple principle—that Congress alone has the power to determine the lawful government of a state—was applied in a number of subsequent cases. *Texas* v. *White,* 74 U. S. 700 (1869). (Only Congress had the power to reestablish and to recognize governments in the rebel states.) *Taylor* v. *Beckman,* 178 U. S. 548 (1900). (The Court declined to decide, under Article IV, Section 4, which of two candidates had been elected governor of Kentucky.)

Initially, the political question doctrine was invoked in Guarantee Clause cases only where the claim attacked the legitimacy of a state government or one of its branches. The doctrine was not applied where a state statute was challenged as incompatible with standards of republican government. Thus, in *Attorney General of Michigan ex rel. Kies* v. *Lowry,* 199 U. S. 233 (1905), the Court decided on the merits that the Michigan Legislature did not contravene Article IV, Section 4, by altering the boundaries of local school districts and transferring property from one to the other. In *Forsythe* v. *City of Hammond,* 166 U. S. 506 (1897), it was held that the state judiciary could de-

termine municipal boundaries without violating the Guarantee Clause. In *Minor* v. *Happersett*, 88 U. S. 162 (1875), the Court held that republican government does not require women's suffrage.

The idea that any Guarantee Clause claim—even if directed not at the legitimacy of a state government but only at a single state law or rule—raises a political and hence nonjusticiable question was first adopted by this Court in *Pacific States Telephone Co.* v. *Oregon, supra.* In that case, the defendant company had claimed that a special tax on the gross revenues of telephone and telegraph companies was unconstitutional because it was enacted through an initiative procedure, a form of direct democracy which the defendant company deemed repugnant to standards of republican government. The Court, citing *Luther* v. *Borden, supra,* as a "leading and absolutely controlling case," held that it was without jurisdiction.

The Court's decision in *Pacific States* rested on the premise that, if the Court had decided the case on the merits for the defendant: (1) its decision would effectively invalidate all acts of the Oregon government and free its citizens from any obligation to obey its laws; (2) it would thus force the Court into a direct conflict with the Congress which alone has the power to determine the legitimacy of state governments. 223 U. S. at 141-142.

We believe that the premise on which the *Pacific States* decision rests is demonstrably false. There is no reason why the unconstitutionality of a single act of a state government or one of its branches should be deemed a challenge to the legitimacy of the whole state government or

any of its branches. This is so whether the challenged legislation, act or rule of the state violates the Due Process Clause of the Fourteenth Amendment or the Guarantee Clause.

Moreover, had the Court decided the case on the merits, there was no possibility that it could have been forced into conflict with Congress. By seating representatives and senators from Oregon, Congress may have determined the legitimacy of that state's government but it surely did not determine the compatibility of the initiative procedure with republican standards. A finding by the Court on the merits —either for or against the defendant company—would not have interfered with either the legislative or executive branches in the performance of their respective responsibilities under the Guarantee Clause. Indeed, a decision on the merits for the defendant would not necessarily have put in jeopardy all the statutes theretofore adopted by the initiative procedure. By applying the decision prospectively and granting all prior statutes adopted by the initiative method the recognition frequently given to a *de facto* government, there would have been no risk of incurring the disorder which the political question doctrine seeks to avoid. *Baker* v. *Carr,* 369 U. S. 186, 250 (1962).

The *Pacific States* decision, arguably, might be justified as judicial deference to the possibility of some *future* political determination by Congress of the issue before the Court (i.e., the compatibility of the initiative to republican standards of government). This may not be said, however, of the many cases which followed in the wake of *Pacific States.* Thus, the following claims made under the Guarantee Clause were found by this Court to present political ques-

tions and therefore to be non-justiciable: (1) that Nebraska could not delegate to an inferior court the power to organize and manage drainage districts (*O'Neill* v. *Leamer*, 239 U. S. 244 (1915)); (2) that Virginia could not delegate power to its Milk Commission to fix prices for cream (*Highland Farms Park, Inc.* v. *Agnew*, 300 U. S. 608 (1937)); and (3) that Ohio could not require the concurrence of all but one of the judges of its Supreme Court to invalidate a statute (*Ohio ex rel. Bryant* v. *Akron Park District*, 281 U. S. 74 (1930)).

The admission by the Congress or representatives and senators from the various states may not realistically be construed as a determination by Congress of issues of this kind. A decision by the Court on the merits in any of these cases would not have placed in jeopardy any act or statute other than the one before the Court. The doctrine of *Luther* v. *Borden, supra*, i.e., that the power to grant recognition and legitimacy to state governments is entrusted to the Congress, simply has no relevance or application to any of these claims. So, too, if this Court were to decide on the merits whether the Guarantee Clause was impaired by the resolution of the Georgia Legislature denying Julian Bond his legislative seat, such a decision would not in any way place in jeopardy the legitimacy of the Georgia State government or of its legislative branch; nor would it place this Court in conflict with either the President or the Congress.

In any event, we believe with Justice Frankfurter that this Court's decision in *Baker* v. *Carr, supra*, effectively repudiated the *Pacific States* decision and the whole line

of cases which follow it. As Justice Frankfurter noted in his dissenting opinion, "the present case involves all the elements that have made the Guarantee Clause case non-justiciable. It is, in effect, a Guarantee Clause claim masquerading under a different label." 369 U. S. at 297.

We therefore urge the Court now to rescue the Guarantee Clause from its ill-deserved state of constitutional desuetude. While there may be functional and persuasive reasons for this Court to decline to assert jurisdiction where a claim is made attacking the legitimacy of a state government, such reasoning has no force in a case of this kind. We do not argue that the Georgia government is no longer entitled to Congressional recognition as the legitimate government of that state, or that all acts of the Georgia Legislature adopted in Bond's absence are invalid. We call into question only the resolution of the Georgia Legislature excluding Julian Bond from its membership, no more.

We recognize that, because this Court for so long has declined jurisdiction in Guarantee Clause cases, it has not yet fully defined the essential requirements of republican government. But fifty years ago, although the Court had not yet given definite meaning to the Due Process Clause, it did not therefore decline jurisdiction of due process cases. We therefore respectfully suggest that the time is now ripe to begin to develop judicial criteria by which the compatibility of acts and resolutions of a state legislature with republican standards of government may be judicially determined.

In *Chisholm* v. *Georgia, supra,* this Court characterized a republican form of government as one in which "the Supreme Power resides in the people." No more precise definition is required to determine this case under the Guarantee Clause. To deny a duly elected representative his seat in the legislature because of his statements on issues of public policy is to deny the people their sovereign power and so to impair the constitutional guarantee of the republican form of government. We therefore urge this Court to hold that, under Article IV, Section 4, of the United States Constitution the Georgia Legislature had no constitutional right or power to deny Bond his seat.

Conclusion

It is respectfully submitted that the judgment below should be reversed on the ground that the Georgia House of Representatives was without power to refuse to seat a duly elected representative because of his public expression of views on political issues.

Respectfully submitted,

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October, 1966

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IN THE

Supreme Court of the United States

October Term, 1966

No. 87

JULIAN BOND, DR. MARTIN LUTHER KING, JR., AND MRS. AREL KEYES,

Appellants

v.

JAMES "SLOPPY" FLOYD, ET AL.,

Appellees

On Appeal from the United States District Court For the Northern District of Georgia (Atlanta Division)

BRIEF FOR THE APPELLEES

QUESTIONS PRESENTED

Whether a legislative body in judging a member's constitutional qualification for public office has violated that member's constitutional right of free speech and whether such an adjudication can be an ex post facto law or a bill of attainder. An additional question is presented with respect to the constitutional rights of the electorate as to their right to vote and to a republican form of government in cases where the elected official is judged to lack qualification for office.

STATEMENT OF THE CASE

This case involves an adjudication by the Georgia House of Representatives concerning the qualifications of Mr. Julian Bond, one of its elected members. The facts which are pertinent to the questions before the Supreme Court are stated in chronological sequence.

A. The Election of Julian Bond.

Mr. Julian Bond was elected to the House of Representatives of the General Assembly of Georgia to fill a new seat created as a result of the reapportionment decision in *Toombs* v. *Fortson,* 241 F. Supp. 65 (N.D. Ga. 1965).

Mrs. Arel Keyes was, at all times material to these issues, a resident and qualified voter in Georgia House District 136, the newly created House District. (R. 104).

Dr. Martin Luther King, Jr., was not a registered voter in House District 136 (R. 104), but was registered to vote in another district, where he presumably voted. (R. 120.)

Mr. Bond was duly elected to the office by the voters of his district (R. 105), and no question is presented with respect to the vote count or with respect to any person's access to the ballot box. The registered voters were permitted to vote freely; a majority voted for Mr. Bond. (Stipulation ¶6, R. 103, 105.)

B. Mr. Bond's Endorsement of the January 6, 1966, Statement by "The Student Nonviolent Coordinating Committee."

Mr. Bond was, at all times material to these issues, Communications Director of the Student Non Violent Coordinating Committee, an organization active in the

civil rights field. This organization made, on January 6, 1966, a statement concerning this country's participation in the war in Viet Nam. That statement received wide publicity and is as follows:

"The Student Nonviolent Coordinating Committee has a right and a responsibility to dissent with United States foreign policy on an issue when it sees fit. The Student Nonviolent Coordinating Committee now states its opposition to United States' involvement in Viet Nam on these grounds:

"We believe the United States government has been deceptive in its claims of concern for freedom of the Vietnamese people, just as the government has been deceptive in claiming concern for the freedom of colored people in such other countries as the Dominican Republic, the Congo, South Africa, Rhodesia and in the United States itself.

"We, the Student Nonviolent Coordinating Committee, have been involved in the black people's struggle for liberation and self-determination in this country for the past five years. Our work, particularly in the South, has taught us that the United States government has never guaranteed the freedom of oppressed citizens, and is not yet truly determined to end the rule of terror and oppression within its own borders.

"We ourselves have often been victims of violence and confinement executed by United States government officials. We recall the numerous persons who have been murdered in the South because of their efforts to secure their civil and human rights, and whose murderers have been allowed to escape penalty for their crimes.

"The murder of Samuel Young in Tuskegee, Ala., is no different than the murder of peasants in Viet Nam, for both Young and the Vietnamese sought, and are seeking, to secure the rights guaranteed them by law. In each case the United States government bears a great part of the responsibility for these deaths.

"Samuel Young was murdered because United States law is not being enforced. Vietnamese are murdered because the United States is pursuing an aggressive policy in violation of international law. The United States is no respecter of persons or law when such persons or laws run counter to its needs and desires.

"We recall the indifference, suspicion and outright hostility with which our reports of violence have been met in the past by government officials.

"We know that for the most part, elections in this country, in the North as well as in the South, are not free. We have seen that the 1965 Voting Rights Act and the 1964 Civil Rights Act have not yet been implemented with full federal power and sincerity.

"We question, then, the ability and even the desire of the United States government to guarantee free elections abroad. We maintain that our country's cry of 'preserve freedom in the world' is a hypocritical mask behind which it squashes liberation movements which are not bound, and refuse to be bound, by the expediencies of the United States cold war policies.

"We are in sympathy with, and support, the men

in this country who are unwilling to respond to a military draft which would compel them to contribute their lives to United States aggression in Viet Nam in the name of the 'freedom' we find so false in this country.

"We recoil with horror at the inconsistency of a supposedly 'free' society where responsibility to freedom is equated with the responsibility to lend oneself to military aggression. We take note of the fact that 16 percent of the draftees from this country are Negroes called on to stifle the liberation of Viet Nam, to preserve a 'democracy' which does not exist for them at home.

"We ask, where is the draft for the freedom fight in the United States?

"We therefore encourage those Americans who prefer to use their energy in building democratic forms within this country. We believe that work in the civil rights movement and with other human relations organizations is a valid alternative to the draft. We urge all Americans to seek this alternative, knowing full well that it may cost them lives — as painfully as in Viet Nam." (R. 135.)

Mr. Bond endorsed the above statement and stated with respect to his endorsement:

"Why, I endorse it, first, because I like to think of myself as a pacifist and one who opposes that war and any other war and eager and anxious to encourage people not to participate in it for any reason that they choose; and secondly, I agree with this statement because of the reason set forth in it — because I think it is sorta hypocritical for us to

maintain that we are fighting for liberty in other places and we are not guaranteeing liberty to citizens inside the continental United States." (R. 138.)

Mr. Bond added that he admired the courage of persons who burned their draft cards; that he was a pacifist who was eager and anxious to encourage people not to participate in the war in Viet Nam for any reason that they might choose; and said that as a second class citizen he did not feel that he should be required to support the war in Viet Nam. Mr. Bond also said that he did not know whether he would commit treason, that he did not know if he was strong enough to put himself in a position where he would be guilty of treason. (R. 112.)

C. The Adjudication by the Georgia House of Representatives with Respect to Mr. Bond's Qualifications.

On the first day of the House session, at which time Mr. Bond and other members of the House were to take the oath of office, Mr. Bond was asked to step aside because challenges to his qualifications had been filed. After the other members were sworn, petitions protesting the seating of Representative-Elect Bond were referred by the Speaker of the House to a special committee designated to hear the contest. Mr. Bond was represented by counsel at the hearing and testified. He reaffirmed his adherence to all of his statements and stated that they were still his views. There was no evidence that Mr. Bond had receded in any way from his views. (R. 36-44.)

One of the challenges was based on the theory that Mr. Bond's views were at odds with the oath of office

required of a State Legislator and he was not qualified as such. (R. 13.) The committee, after hearing, recommended that he not be seated. (R. 26.) This recommendation was accepted by the House and he was denied his seat by a vote of one hundred eighty-four to twelve. (R. 99.)

The Appellants in their notice of appeal raised questions of procedural due process of law with respect to the action by the House of Representatives and the special committee. (Notice of Appeal ¶H, R. 180, 183.) However, as no question is thus presented in their brief, we presume that those questions have been abandoned.

D. Federal Court Review of the Judgment of the Qualifications of Mr. Bond Made by the Georgia House of Representatives.

The Georgia House of Representatives judged the qualifications of Mr. Bond and found against him. (R. 99.)

Mr. Bond filed suit in the Federal District Court for the Northern District of Georgia. Mrs. Arel Keyes, a resident and qualified voter in House District 136 joined with Mr. Bond as a party plaintiff, as did Dr. Martin Luther King, Jr. (R. 1.)

A three-judge court was convened under 28 U.S.C. §2281, for the trial of the issues. (R. 100.)

A motion to strike Mrs. Keyes and Dr. King as parties plaintiff for lack of standing was made (R. 102) and a motion to dismiss for lack of jurisdiction was made. (R. 121.)

The Defendants answered the complaint (R. 125) and the parties filed stipulations of fact. (R. 103.)

The full court found that it had jurisdiction over the subject matter of the complaint. (R. 179, 180.)

A majority of the court was of the opinion that neither Mrs. Keyes nor Dr. King had such a direct interest in the litigation as would give them standing to bring the complaint. (R. 179.)

The majority held with respect to the merits of the case, that there was sufficient evidence before the Georgia House to support a finding that Mr. Bond did not possess qualifications and the complaint was dismissed. (R. 133, 141.)

Chief Judge Tuttle dissented (R. 154), basing his opinion on a construction of the Georgia Constitution with respect to the question of qualifications. The qualifications must, according to the dissenting opinion, be set out in the State Constitution (R. 166, 167), and there was no evidence that Mr. Bond lacked any of the qualifications required by the Georgia Constitution.

Mr. Julian Bond, Dr. Martin Luther King, Jr., and Mrs. Arel Keyes have appealed the judgment. (R. 180.)

SUMMARY OF ARGUMENT

I. Historically courts have refused to assume jurisdiction in cases involving the determination of qualifications of members of legislative bodies. This Court has never asserted such jurisdiction. Even if jurisdiction might exist under certain circumstances, this Court has stated that controversies concerning the seating of state officials do not ordinarily produce substantial federal questions. *Wilson* v. *North Carolina,* 169 U.S. 586, 18 S. Ct. 435, 42 L. Ed. 865 (1898).

Cases involving the qualification of legislative officials present political questions which are not justiciable, as the challenge of the qualifications of a legislator does not involve the basic political organization of a state. *Baker* v. *Carr,* 369 U.S. 186, 231, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962).

II. The people of the United States require that the legislators, both of the United States and of the several states, shall be bound to support the Constitution of the United States, Article VI, Clause 3, U. S. Constitution.

Only the Georgia House of Representatives has the constitutional power to judge the qualifications of an individual member, even though some of those qualifications be set forth in the Constitution of the United States.

The qualification required of state legislators by the United States Constitution is neither unclear nor unreasonable, and the requirement of minimal loyalty to the government is worth the price of whatever deprivation of individual freedom involved.

Mr. Bond was measured by qualifications set forth in both the United States and Georgia Constitutions, and not by any new ones created for the occasion.

III. The First Amendment to the United States Constitution cannot be considered in a vacuum, but must be considered in relation to, and as a part of, a theory of government designed to insure the right of the people to govern themselves.

Mr. Bond's speech was a call to action at odds with the premises of orderly democratic government, and as such was not protected by the First Amendment. Mr. Bond's

election placed him in the role of a servant of the people, who are the governors in our political society under the Constitution. As an agent of the people, Mr. Bond was required to possess certain qualifications set forth in the organic law of the nation. The Georgia House found that he did not possess these qualifications.

Mr. Bond was not the citizen-critic of *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964), but rather was an official required specifically to uphold and support the Constitution and laws of the United States and of the State of Georgia.

A requirement of similar qualifications for other governmental employees has never been questioned by this Court. *Baggett* v. *Bullitt,* 377 U.S. 360, 379, 84 S. Ct. 1316, 12 L. Ed. 2d 377 (1964). Indeed, the requirement of loyal state and federal legislators is as essential to a preservation of the right of the people to govern as is the right of citizens to comment upon public issues.

IV. The federal courts, should they assert jurisdiction in cases such as this, should only review the adjudications by legislative bodies to determine whether or not the standards of due process of law are met. In matters involving political questions not related to the basic political organization of the states, this Court should only require that a rational basis exist to support the actions of the legislative branch of government. Mr. Bond's statements, under the circumstances, constituted a rational basis upon which the fact-finding body could conclude that he did not possess the qualifications demanded.

V. The action of the Georgia Legislature did not constitute a Bill of Attainder or an ex post facto law, as it

was a judicial act specifically authorized by the Constitution and not a legislative undertaking.

VI. The case at bar does not involve any discrimination based on race, creed or color. Such a claim on behalf of Mr. Bond or his constituents is without foundation in fact. Neither Dr. King nor Mrs. Keyes has standing to challenge the action of the Georgia House of Representatives, as they have not shown any direct injury. A temporary lack of representation does not deprive voters of a republican form of government. *Barry* v. *U. S.*, 279 U.S. 597, 616, 49 S. Ct. 452, 73 L. Ed. 867 (1929).

ARGUMENT

I. A Complaint Based Upon An Adjudication by a Legislative Body of the Qualifications of One of Its Members Presents No Justiciable Issue and Should Be Dismissed for Lack of Jurisdiction.

The determination of the qualifications of members of legislative bodies has historically been entrusted to the legislative body. Note, the Right of Congress to Exclude its Members, 33 Va. L. Rev. 322 (1947). The proposition that legislative bodies be the sole judge of the qualifications of their members is a part of the law of the United States and of every member state. *Lucas* v. *McAfee,* 217 Ind. 534, 29 N.E. 2d 403, 405 (1940).

Georgia provides in her Constitution, Art. III, §VII, Par. I:

> "Each House shall be the judge of the election, returns and qualifications of its members . . . ." (Ga. Code Ann. §2-1901.)

Generally it has been held that a question of a member's qualifications cannot be determined by the judiciary, but such determination is solely and exclusively within the jurisdiction of the legislative body. 1 Cooley, *Constitutional Limitations,* pp. 270-71; 16 C.J.S. *Constitutional Law,* §152; 16 Am. Jur. 2d *Constitutional Law* §226; Annot. 107 A.L.R. 205 (1937).

State courts have generally held that they are wholly without jurisdiction in such cases even where the legislative action is arbitrary and violative of fundamental rights of the individual whose qualifications are challenged. See e.g., *Reif* v. *Barrett,* 355 Ill. 104, 188 N.E. 889, 898-900 (1933). This view is adhered to by the Supreme Court of Georgia in connection with the adju-

dication of qualifications of the members of the Senate and House of Representatives of this State. *Beatty* v. *Myrick,* 218 Ga. 629, 129 S.E. 2d 764 (1963); *Rainey* v. *Taylor,* 166 Ga. 476, 143 S.E. 383 (1928).

The same legal principle has always been thought to prevail on the federal level. The United States Constitution contains language almost identical to that of the Georgia Constitution and provides in Article I, Section 5, Paragraph I:

> "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, ..."

This Court has clearly indicated that the power of Congress in such matters is plenary and not subject to judicial review. See *Barry* v. *United States,* 279 U.S. 597, 613, 619, 49 S. Ct. 452, 73 L. Ed. 867 (1929), in which the United States Senate was referred to as the "sole authority" under the Constitution to judge the elections, returns and qualifications of its members.

It is significant that neither this Court, nor any lower federal court, prior to the case at bar, has ever asserted jurisdiction in a case involving the determination or adjudication of qualifications of state or federal legislators. The historical implication would seem to be that there is no such jurisdiction.

Appellees fully recognize that the horizontal application of the separation of powers principle to preclude judicial review by state courts of the state constitutional prerogative of a state legislature, and by federal courts of the federal constitutional prerogative of the two houses of Congress, may not be wholly determinative of questions of jurisdiction and justiciability where plain-

tiffs seek to test the action of a *state* legislature under federal constitutional standards (i.e., a vertical application) in seating controversies. Appellees would not maintain, in light of *Gomillion* v. *Lightfoot,* 364 U.S. 339, 81 S. Ct. 125, 5 L. Ed. 2d 110 (1960), that a state legislature could systematically exclude all Negroes without interference by a federal judiciary charged with the duty of protecting constitutional rights of all citizens.

On the other hand this Court has long since pointed out that controversies about the seating of state officials do not ordinarily produce the substantial federal question which is required to vest federal courts with jurisdiction. In *Wilson* v. *North Carolina,* 169 U.S. 586, 593, 18 S. Ct. 435, 42 L. Ed. 865 (1898), where a state official had been suspended from his office by the Governor without opportunity to see the evidence against him, to confront his accusers and cross-examine witnesses (all of which was alleged to be in denial of his rights under the Fourteenth Amendment), this Court, in refusing to interfere, stated:

> "The procedure was in accordance with the constitution and laws of the State. It was taken under a valid statute creating a state office in a constitutional manner, as the state court has held. What kind and how much of a hearing the officer should have before suspension by the Governor was a matter for the legislature to determine, having regard to the constitution of the State. The procedure provided by a valid state law for the purpose of changing the incumbent of a state office will not in general involve any question for review by this court. A law of that kind does but provide for the carrying out and enforcement of the policy of a state

> with reference to its political and internal administration . . . . The facts would have to be most rare and exceptional which would give rise in a case of this nature to a Federal question."

This Court's refusal to entertain Fourteenth Amendment claims respecting the seating and unseating of state officials was subsequently reaffirmed in *Taylor and Marshall* v. *Beckham,* 178 U.S. 548, 20 S. Ct. 890, 44 L. Ed. 1187 (1900); *Elder* v. *Colorado,* 204 U.S. 85, 27 S. Ct. 223, 51 L. Ed. 381 (1907); and *Walton* v. *House of Representatives of the State of Oklahoma,* 265 U.S. 487, 44 S. Ct. 628, 68 L. Ed. 1115 (1924).

The most recent decision of this Court which would appear to have a direct bearing on the question of an individual's right to be seated in a state legislature is *Snowden* v. *Hughes,* 321 U.S. 1, 64 S. Ct. 397, 88 L. Ed. 497 (1944). There the complaint alleged that the State Primary Canvassing Board, in violating state laws through willful refusal to correctly certify the results of a primary election, had also deprived petitioner of rights secured to him under both the "privileges and immunities" and "equal protection" clauses of the Fourteenth Amendment. In holding that the complaint failed to state a cause of action, this Court stated, at p. 6-7:

> "The protection extended to citizens of the United States by the privileges and immunities clause includes those rights and privileges which, under the laws and Constitution of the United States, are incident to citizenship of the United States, but does not include rights pertaining to state citizenship and derived solely from the relationship of the citizen and his state established by state law . . . . The right to become a candidate for

state office, like the right to vote for the election of state officers . . . is a right or privilege of state citizenship, not of national citizenship which alone is protected by the privileges and immunities clause.

"More than forty years ago this Court determined that an unlawful denial by state action of a right to state political office is not a denial of a right of property or of liberty secured by the due process clause. *Taylor & Marshall* v. *Beckham,* 178 U.S. 548. Only once since has this Court had occasion to consider the question and it then reaffirmed that conclusion, *Cave* v. *Newell,* 246 U.S. 650, as we reaffirm it now."

The "equal protection" contentions were similarly rejected and the Court concluded:

"[I]t is not without significance that we are not cited to and have been unable to find a single instance in which this Court has entertained the notion that an unlawful denial by state authority of the right to state office is without more a denial of any right secured by the Fourteenth Amendment." (*Id.* at p. 12.)

It may be asked whether the foregoing line of decisions has been superseded by *Baker* v. *Carr,* 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962). We think not. In *Baker* v. *Carr* this Court expressly referred to such prior decisions, and while obviously presented with the opportunity to repudiate the rationale which they express, refrained from doing so. The Court instead distinguished those decisions, explaining that they did not go so far as to limit the jurisdiction of federal courts to inquire into matters of the basic governmental organi-

zation of the states (e.g., the apportionment of state legislatures). *Id.* at 231.

The challenge and determination of the qualifications of an individual legislator, however, for deficiencies in qualifications peculiar to him, is obviously not a question involving the basic political organization of a state. Therefore, the continuing vitality of such cases insofar as the qualifications, seating, and unseating of state officials is concerned has not been diminished by *Baker* v. *Carr.*

Moving from the above review of the past refusals of this and all other courts to substitute their judgment for the determination of a legislative body in controversies over the seating or unseating of a particular legislator, the precise question of whether this Court should now, for the first time, abandon this long standing policy and review the action of the House of Representatives of Georgia in the case at bar must be considered. It may be observed at the outset that this Court has pointed to two "dominant" criteria which should be considered in determining whether an issue falls into that category of political matters from which the federal courts may properly abstain on the ground that, notwithstanding the presence of jurisdiction, the question presented is essentially nonjusticiable. These two primary considerations are (1) the propriety of attributing finality to the action of the political body, and (2) the lack of satisfactory criteria for making a judicial determination. *Baker* v. *Carr,* 369 U.S. 186, 210, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962); *Coleman* v. *Miller,* 307 U.S. 433, 454-55, 59 S. Ct. 972, 83 L. Ed. 1385 (1939). Appellees respectfully urge the Court that in the instant situation the impossibility of satisfying both of these dominant criteria,

along with other sound policy reasons, suggests that the more appropriate course of action for this Court would be to dismiss the appeal for failure to present a justiciable question.

Looking first to the criterion of the appropriateness of attributing finality to the action of the legislature, it would seem self-evident that the efficient operation of a legislative body makes it highly desirable that it have the power of self-protection (which the constitution of every state and the federal government have sought to vest in such political bodies to determine the election, returns, and qualifications of its members). See e.g., *Re Chapman,* 166 U.S. 661, 668, 17 S. Ct. 677, 41 L. Ed. 1154 (1897); Story, *Comm. on the Const.,* Vol. II §831 p. 294.

As pointed out by the Court of Appeals of Kentucky *in Raney* v. *Stovall* (Ky.), 361 S.W. 2d 518, 523 (1962):

> "If the qualifications of members (of the state legislature) were subject to litigation in the courts, particularly during a session and particularly in view of the unavoidable judicial delay, the conduct of the public business would be completely disrupted."

The second criterion utilized by this Court, lack of satisfactory criteria for making a judicial determination, would also seem to indicate the propriety of judicial abstention. The question of whether or not an individual is qualified to be seated as a member of the Georgia House of Representatives involves a determination by the House which is largely of a factual nature. See e.g., *Hiss* v. *Bartlett,* 3 Gray 468, 63 Am. Dec. 768 (1855). The determination is a consensus of the indi-

vidual judgments of all of the members of the House, and it may be respectfully suggested that for the Courts to inquire into the mind of each and every legislator to determine whether his vote was based upon adequate and proper criteria would be no mean task.

Finally, Appellees urge that regard for the federal system and separation-of-powers concept is also an important policy reason supporting judicial abstention on the ground of nonjusticiability. The terminology employed by this Court would seem to clearly indicate that the two criteria specified are not exclusive and that in any given situation other sound policy reasons might appear which would authorize the federal judiciary to abstain on the ground of nonjusticiability. The long history of the doctrine that legislative bodies possess exclusive power to determine the elections, returns, and qualifications of their own members along with the universal conclusion of the courts that this adjudication of the legislative branch of government ought not to be interfered with by the judiciary, has already been noted. To paraphrase the language of this Court in *Snowden* v. *Hughes,* 321 U.S. 1, 12, 64 S. Ct. 397, 88 L. Ed. 497 (1944), it is not without significance that from the very start until the present time we are unable to find a single instance where the federal courts have required the seating in any legislative body, state or federal, of an individual determined by such body to be unqualified to be seated therein, who has been expelled by the legislative body, or who was determined by the legislature to have been the loser in a contested election.

As to the fear that a policy of judicial abstention might lead to abuse, we think the best answer is that given by the Supreme Court of California in *French* v.

Senate of State of California, 146 Cal. 604, 80 P. 1031, 1034 (1905), when it said:

> "With respect to the possible abuse of such power, the case is analogous to that of the President of the United States with respect to officers of the United States subject to arbitrary removal by him. In regard to this the Supreme Court of the United States says that the only restraint upon the abuse of the power 'must consist in the responsibility of the President, under his oath of office, to act as shall be for the general benefit and welfare.' Shurtleff v. U. S., 189 U.S. 317, 23 Sup. Ct. 535, 47 L. Ed. 828. The same is true of the power of the Senate here under consideration. The oath of each individual member of the Senate, and his duty under it to act conscientiously for the general good, is the only safeguard to the fellow members against an unjust and causeless expulsion. This is the only practical rule that can be adopted as to those unrestricted governmental powers which are necessary to the exercise of governmental functions, and which must be lodged somewhere. Each department of the state is necessarily vested with some power which is beyond the supervision of any other department, and in such cases the only protection against abuse is the conscience of the individual in whom the power is vested."

Over sixty-five years ago this Court observed in *Taylor and Marshall* v. *Beckham,* 178 U.S. 548, 570-71, 20 S. Ct. 890, 44 L. Ed. 1187 (1900):

> "It is obviously essential to the independence of the states, and to their peace and tranquility, that their power to prescribe the qualifications of their

> own officers . . . should be exclusive, and free from external interference, except so far as plainly provided by the Constitution of the United States."

The policy of this nation, as declared by the President of the United States, is to encourage creative federalism,[1] and Appellees suggest that this is perhaps all the more reason for giving effect to federalism in connection with our newly reapportioned, and politically responsible, state legislature. The power of a state legislature to determine controversies respecting the seating or unseating of its own members, at least in the absence of some extraordinary and gross abuse which clearly and unambiguously violates a federally protected right (e.g., a clear showing of a purposeful and systematic exclusion on the ground of race, color or religion, or the showing of a continued pattern of some other abuse of which no other possible remedy appears, such as a malapportioned legislature) should be preserved. Inasmuch as no such extraordinary circumstance is present in the instant case, it is respectfully submitted that the legislative prerogative of the Georgia House of Representatives should be upheld and the appeal dismissed for want of a justiciable issue.

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[1]Speech made on May 22, 1964, at Ann Arbor, Michigan, in which the President set forth his concept of the Great Society, Congressional Quarterly Weekly Report, Vol. XXIV, Number 16, April 22, 1966, p. 833.

II. A Legislator Not Bound to Support the United States Constitution Lacks Requisite Qualifications for Public Office.

The Brief for the Appellants exhibits the fact that either they have unintentionally ignored the most important qualification which a member of a state legislature must possess, or they have deliberately attempted to divert this Court from the issue determined by the Georgia House of Representatives and the Court below.

As already pointed out, both federal and state Constitutions make the respective houses the judges of the qualifications of their members.

Article VI, Clause 3, of the United States Constitution requires the following qualifications for offices enumerated:

> "The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution."

In addition, the Constitution of Georgia requires that each state legislator, before being seated, must take an oath to support the Constitution of Georgia and of the United States. *Article III, Section IV, Para. V, Constitution of Georgia.* These are the qualifications which were in question before the Georgia House of Representatives. (R. 13.) As summarized by the Court below:

> "Mr. Bond's right to speak and to dissent as a private citizen is subject to the limitation that he sought to assume membership in the House. As

> such he was required to take an oath to support the Constitution of the United States. This is a legitimate requirement. Indeed, the Federal Constitution requires it. Art. VI, § 3. One of the charges against him was that his statements were inconsistent with and repugnant to that oath. Was there any basis for this charge?" (R. 151.)

This legitimate qualification has been overlooked, whether intentionally or otherwise, by the Appellants.

Any discussion of a theory that a legislative body may not create new qualifications above and beyond those set forth by organic law for office may be intriguing, but it is certainly not relevant to the case at bar. The history of the Middlesex election case of John Wilkes is of great historical interest, but cannot be cited as authority for any legal position upon which the Appellants can rely.

The qualification which Mr. Bond lacked was the ability to support and uphold the Constitution and laws of the United States and of Georgia. The portion of the Georgia oath which the Appellants feel to be violative of the Due Process clause of the Fourteenth Amendment was never in issue before the Georgia House. They refer to that portion of the Georgia oath that states:

> ". . . on all questions and measures which may come before me, I will so conduct myself, as will, in my judgment, be most conducive to the interests and prosperity of this State . . ."

as a "promissory oath." Perhaps it is. But this general admonition to a legislator to perform his duties wisely and well was not the standard by which Mr. Bond was judged. It was decided that he lacked the ability to up-

hold and support the fundamental law of his nation and his state.

This qualification is required of state legislators by both the Federal and the State Constitutions. It is not vague or unclear or uncertain. It means precisely what it says, and it is significant that this Court has never considered language of this nature impermissibly vague. In *Baggett* v. *Bullitt,* 377 U.S. 360, 84 S. Ct. 1316, 12 L. Ed. 2d 377 (1964), the Court stated at page 379, that:

> ". . . We do not question the power of a State to take proper measures safeguarding the public service from disloyal conduct."

In this case, the Georgia House of Representatives was placed under a firm and solemn duty to judge whether or not Mr. Bond possessed the qualifications demanded of state legislators by both the Federal and State Constitutions. This duty, no doubt disagreeable to some, could not be avoided. The Georgia House faced and met its constitutional responsibilities. Even if by some exercise in constitutional semantics it could be contended that the requirements of the Georgia Constitution were void for vagueness or invalid for any other reason, the qualification for state and federal legislators prescribed by the United States Constitution cannot violate the Fourteenth Amendment, or any other concept of due process in the Constitution. The qualification appears in the body of the Constitution itself. *United States Constitution,* Article VI, Clause 3.

Article VI, Clause 2, of the United States Constitution provides that:

> "This Constitution . . . shall be the supreme Law of the Land . . ."

It was mandatory for the Georgia House of Representatives to determine whether or not the Appellant Bond possessed the qualifications required by the Constitution, after those qualifications were placed into question by protests duly filed. The Georgia Constitution makes each house the judge of the qualifications of its members. In addition to the qualifications of age and residency, the two Constitutions require an ability to uphold and support the Constitution and laws of the United States. Only the tribunal of the state given the power to judge qualification of legislators by the state constitution can perform this function. Obviously, neither Congress nor any other organ of the Federal Government can carry out this duty.

Therefore, there does exist at least one qualification, not appearing in the State Constitution, which the State Legislature of Georgia, by virtue of the power vested in it by the State Constitution, must adjudicate if the question is properly raised in respect to one of its member. A legislator not bound to support and uphold the Constitution and laws of the United States lacks the requisite qualifications for public office. In *American Communications Association* v. *Douds,* 339 U.S. 382, 70 S. Ct. 674, 94 L. Ed. 925 (1950), this Court commented on the particular qualification imposed by Article VI, Clause 3, of the Constitution, at page 415:

> "Obviously the Framers of the Constitution thought that the execution of an affirmation of minimal loyalty to the government was worth the price of whatever deprivation of individual freedom of conscience was involved."

This qualification of minimal loyalty for state legislators has never been questioned heretofore.

Mr. Bond indicated by his actions that he might be deficient in respect to the qualification mentioned above. After having heard the evidence, the House, pursuant to the mandate of the United States Constitution, determined that Mr. Bond did not possess the qualifications required by the supreme law of the land.

III. The Requirement of Loyal Legislators, Protected by Article VI of the United States Constitution, Like the First Amendment, Seeks the Protection of Democratic Processes for the People.

The citizens of Georgia have always cherished the liberty of speech and have from the early history of this state and country ought to protect this right. The Constitution of Georgia provides, Article I, Section 1, Paragraph XV:

> "No law shall ever be passed to curtail, or restrain the liberty of speech, or of the press; . . ." (Ga. Code Ann. §2-115).

The meaning of Freedom of Speech has in recent years been re-examined and the protection afforded has been restated.

The purpose of the First Amendment to the United States Constitution is the protection of our democratic processes, and thus of our government.

Mr. Harry Kalven, Jr., has summarized this idea, stating:

> "The amendment has a 'central meaning' — a core of protection of speech without which democracy cannot function, without which, in Madison's phrase, 'the censorial power' would be in the Government over the people and not 'in the people over

the Government.' " Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment."* 1964 *The Supreme Court Review,* p. 191, 208.

This Court stated in *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 270, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) that speech concerning public affairs is the essence of self-government and that the First and Fourteenth Amendments embody our

> ". . . profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."

This does not mean, however, that all utterances are to be protected absolutely. This Court said in *Garrison* v. *State of Louisiana,* 379 U.S. 64, 75, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964), that the use of a known lie is not to be protected.

Alexander Meiklejohn states at page 88 in *Political Freedom* (1960):

> "Under the Constitution, we are agreed together that we will be, by corporate action, self-governed. We are agreed that as free men, politically equal, we alone will make the laws and that, as loyal citizens, equal before the laws, *we will obey them.* That is our social compact — the source both of our freedoms and of our obligations." (Emphasis added.)

Professor Meiklejohn in 1953, testifying before a Senate Committee on Constitutional Rights, said:

". . . our First Amendment freedom forbids that any

citizen be required, under threat of penalty, to take an oath, or make an affirmation, as to beliefs which he holds or rejects. *Every citizen, it is true, may be required and should be required, to pledge loyalty, and to practice loyalty, to the nation. He must agree to support the Constitution.* But he may never be required to believe in the Constitution. His loyalty may never be tested on grounds of adherence to, or rejection of, any *belief.* Loyalty does not imply conformity of opinion. Every citizen of the United States has Constitutional authority to approve or to condemn any laws enacted by the Legislature, any actions taken by the Executive, any judgments rendered by the judiciary, any principles established by the Constitution. *All these enactments which, as men who are governed, we must obey,* are subject to our approval or disapproval, as we govern. With respect to all of them we, who are free men, are sovereign. We are 'The People.' We govern the United States." Hearing before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 84th Congress, 2nd Session at p. 17 (1955). (Emphasis added.)

The First Amendment does not embrace the right to advocate the violation of law by others. *Fox* v. *Washington,* 236 U.S. 273, 35 S. Ct. 383, 59 L. Ed. 573 (1915); *Cox* v. *Louisiana,* 379 U.S. 559, 85 S. Ct. 476, 13 L. Ed. 2d 487 (1965).

The Supreme Court stated in *Dennis* v. *United States,* 341 U.S. 494, 501, 71 S. Ct. 857, 95 L. Ed. 1137 (1951):

"Whatever theoretical merit there may be to the argument that there is a 'right' to rebellion against dictatorial governments is without force where the

existing structure of the government provides for peaceful and orderly change."

Mr. Bond said that he was eager and anxious to encourage people not to participate in the war in Viet Nam for any reason that they choose. (R. 138.) He said that he did not have a requirement to support that war. He refused to state whether or not he would commit treason. (R. 112.)

Judge Learned Hand in *Masses Publishing Co.* v. *Pattern,* 244 F. 535, 540 (S.D.N.Y. 1917), said:

> "One may not counsel or advise others to violate the law as it stands. Words are not only the keys of persuasion, but the triggers of action and those which have no purpose but to counsel the violation of law cannot by any latitude of interpretation be a part of that public opinion which is the final source of government in a democratic state." On appeal Judge Hand's decision was reversed: 246 F. 24 (2nd Cir. 1917).

Mr. Bond's call to action is at odds with the premises of democratic government. He seeks not the orderly democratic change of our draft laws but encourages the violation of our draft laws for any reasons.

The rule or test used in *Garrison* v. *Louisiana* is perhaps the strictest yet used by the courts. That case did involve a direct abridgment of speech, but even if the *Garrison* rule were to be used in this case, the facts clearly show that he has placed himself outside the area of its protection as a citizen. As a member-elect of a State legislature Mr. Bond not only placed himself beyond First Amendment protection, but also called forth the imposition of constitutionally-required sanctions.

The case at bar calls for an inquiry into the central meaning of the First Amendment, which has been so ably conducted by this Court in the recent cases of *New York Times* v. *Sullivan, supra; Garrison* v. *Louisiana, supra;* and *Rosenblatt* v. *Baer,* 383 U.S. 75, 15 L. Ed. 2d 597, 86 S. Ct. 669 (1966). Indeed, the fundamental right of the American people to govern themselves may depend upon the outcome of this case.

The First Amendment provides that:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

In recent years, by means of cases, discussions and various types of articles, the true meaning and function of the First Amendment in the area of public affairs has been rediscovered. One of the greatest influences in this process of defining the American System, as embodied in the Constitution of the United States and Amendments thereto, has been the teachings of Alexander Meiklejohn, a part of which were quoted above.[2] Dr. Meiklejohn asserted that the structure of government and society adopted by the framers did not merely reformulate the English system of parliamentary (governmental) powers and individual liberties, but rather introduced a unique, and revolutionary set of principles into political society.

> "Apart from the First Amendment itself, the passages of the Constitution which most directly

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[2]Brennan, The Supreme Court and the Meiklejohn Interpretation of the First Amendment, 79 Harv. L. Rev. 1 (1965).

"clarify its meaning are the Preamble, the Tenth Amendment, and Section 2 of Article I. All four provisions must be considered, in their historical setting, not only in relation to one another but, even more important, in relation to the intention and structure of the Constitution as a whole. Out of such consideration the following principles seem to emerge:

1. All constitutional authority to govern the people of the United States belongs to the people themselves, acting as members of a corporation body politic. They are, it is true, 'the governed.' But they are also 'the governors.' Political freedom is not the absence of government. It is self-government.

2. By means of the Constitution, the people establish subordinate agencies, such as the legislature, the executive, the judiciary, and delegate to each of them such specific and limited powers as are deemed necessary for the doing of its assigned governing. These agencies have no other powers.

3. The people do not delegate all their sovereign powers. The Tenth Amendment speaks of powers that are reserved 'to the people,' as well as of powers 'reserved to the States.'

4. Article I, § 2, speaks of a reserved power which the people have decided to exercise by their own direct activity: 'The House of Representatives shall be composed of members chosen every second year by the people of the several States. . . .' Here is established the voting power through which the people, as an electorate, actively participate in governing both themselves as subjects of the laws, and

their agencies, as the makers, administrators, and interpreters of the laws. In today's government, the scope of direct electoral action is wider than the provisions made when Article I, § 2, was adopted, but the constitutional principle or intention is the same.

5. The revolutionary intent of the First Amendment is, then, to deny to all subordinate agencies authority to abridge the freedom of the electoral power of the people.

For the understanding of these principles it is essential to keep clear the crucial difference between 'the rights' of the governed and 'the powers' of the governors. And at this point, the title 'Bill of Rights' is lamentably inaccurate as a designation of the first ten amendments. They are not a 'Bill of Rights' but a 'Bill of Powers and Rights.' The Second through the Ninth Amendments limit the powers of the subordinate agencies in order that due regard shall be paid to the private 'rights of the governed.' The First and Tenth Amendments protect the governing 'powers' of the people from abridgment by the agencies which are established as their servants. In the field of our 'rights,' each one of us can claim 'due process of law.' In the field of our governing 'powers,' the notion of 'due process' is irrelevant." Meiklejohn, *The First Amendment is an Absolute.* The Supreme Court Review, p. 245, 253 (1961).

The core of this theory was summarized precisely by Mr. Justice Brennan when he stated:[3]

[3]Brennan, The Supreme Court and the Meiklejohn Interpretation of the First Amendment, 79 Harv. L. Rev. I, II (1965).

> "The first amendment, in his [Meiklejohn's] view, is the repository of these self-governing powers that, because they are exclusively reserved to the people, are by force of that amendment immune from regulation by the agencies, federal and state, that are established as the people's servants."

It is submitted that this is the view of the First Amendment which this Court has made explicit in *New York Times Co.* v. *Sullivan, supra,* and cases following it.[4]

The *New York Times* case has been hailed as a significant step forward in the exposition of the meaning of Freedom of Speech and of the inner workings of our representative system of democracy. That case involved an action for libel brought by public officials of Alabama because of an allegedly defamatory advertisement appearing in the New York Times. The comments complained of were made by private citizens who criticized the conduct of public officials. The Court held that state laws governing libel actions brought by a public official against those criticizing his official conduct are limited by the safeguards of freedom of speech and press afforded by the First Amendment. In such cases, the Court said that the Constitution requires a showing of "actual malice" before an official can recover damages for defamation of him in his official capacity. Obviously the particular holding in *Times* is not specifically applicable to the case at bar, as this case does not involve comment by a private citizen upon government officials and the use of retaliatory civil actions by those officers. The facts in *Times* involved only the constitutional rights of the

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[4]Kalven, The New York Times Case: A Note on "The Central Meaning of the First Amendment." The Supreme Court Review, pp. 191, 213-218 (1964).

"citizen-critic of government." However, the principles expressed there and in *Garrison* illustrate that the action of the Georgia House was not only constitutionally authorized, but was in fact constitutionally demanded.

The principles were developed by the Court in *Times* in the following orderly fashion. First, the Court said:

> "The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, as we have said, 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' *Roth* v. *United States,* 354 U.S. 476, 484, 1 L. Ed. 2d 1498, 1506, 77 S. Ct. 1304." 376 U.S. 269.

In discussing the Sedition Act of 1798, which did indeed evoke awareness of the meaning of Freedom of Speech, and its relation to, and designed effect on, government, the Court looked to the words of James Madison:

> "Madison prepared the Report in support of the protest. His premise was that the Constitution created a form of government under which 'the people, not the government, possess the absolute sovereignty.' The structure of the government dispersed power in reflection of the people's distrust of concentrated power, and of power itself at all levels." 376 U.S. 274.

Madison recognized that government is constituted of the agents of the people, and therefore the Constitution contained assurances, the First Amendment among them, designed to insure that the governors carried out the will

of the governed. This Court noted the relative positions of the people and the government when it said:

> "It is as much his [the citizen-critic] duty to criticize as it is the official's duty to administer." 376 U.S. 282.

The Constitution and laws of the United States are the result of the citizen's right and responsibility to govern; the official must be bound by that Constitution and those laws so that government does not subvert the governed. The desired end of citizen criticism and official responsibility is, as Mr. Justice Black pointed out in his concurring opinion, that government be responsive to the people and that changes be obtained by peaceful means, for that is the keystone of the constitutional government of the nation. 376 U.S. 301.

The case of *Garrison* v. *Louisiana* applied the rule from *Times* v. *Sullivan* to state prosecutions for criminal libel. *Garrison's* facts also involved no more than criticism of the conduct of particular governmental officials. In dealing with the use of calculated falsehoods, the Court set forth the suppositions and goals of our society as it is politically organized:

> "That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected." 379 U.S. 75.

Thus the Court stated that the calculated lie is one of the types of speech which is inconsistent with the ex-

pression of the will of the people as set forth in the organic law of the people, and therefore enjoys no constitutional protection.

Rosenblatt v. *Baer, supra,* is another recent case which called upon the Court to clarify what governmental employees would be subject to the rule in *Times.* The party involved was a supervisor of a county-owned recreation area who had been attacked verbally by a citizen-critic. In summarizing the meaning of *Times,* in order to show clearly the concepts of government of this country set forth in the Constitution, this Court issued a statement which is peculiarly relevant to the case at bar, and which heralds needed development of the other side of this constitutional coin:

> "The thrust of New York Times is that when interests in public discussion are particularly strong, as they were in that case, the Constitution limits the protections afforded by the law of defamation. Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees, both elements we identified in New York Times are present and the New York Times malice standards apply." 383 U.S. 75, 86, 86 S. Ct. 669, 15 L. Ed. 2d 605.

That case demonstrates the people have an overriding interest in at least two aspects of public officialdom; qualifications and performance. *New York Times, Garrison* and *Rosenblatt* v. *Baer* were cases dealing with citizen comment on the performance of public officials, but

it is clear from those cases that the people have an equally strong interest in the qualifications of public officials, and that interest must also be constitutionally protected. It is.

The Constitution of the United States, and laws validly enacted pursuant to that Constitution, are the methods by which the citizenry of the United States governs. As Prof. Meiklejohn has said, "they are expressions of our own corporate self-control."[5] In order to fully understand the checks in the Constitution which maintain control by the people, the electoral and governmental process must be considered as a whole. First, the power to elect their representatives is lodged in the people by the Constitution and by the guarantee of a Republican Form of Government, in the case of the states. Then, the right of citizen-criticism, elaborated upon in *Times,* gives a great measure of protection to the people. And, finally, at a future election, the people may pass judgment upon their servants. But, prior to these safeguards, and of much greater importance, is the requirement of qualifications.

Qualifications set forth in the Constitution, and in state constitutions, are not intended to be meaningless job requirements, no matter how trivial they may seem at first glance. A member of Congress, for example, must be twenty-five years of age and seven years a citizen of the United States. Article I, Section 2, Clause 2, Constitution of the United States. These qualifications have a definite purpose in our constitutional scheme, for the Framers had no special distaste for young men twenty-

[5]Meiklejohn, *Political Freedom,* p. 17.

four years of age.[6] The purpose of these qualifications is to insure that those elected are wise and mature, have a knowledge of their country's customs and traditions, and hopefully, a love of their nation. Constitutional qualifications are a fundamental expression of the people's will which has priority over passing electoral whims. A given constituency can elect a nineteen year old congressman who is a citizen of Liechtenstein. But he does not possess the requisite qualifications, and, if challenged, may not be seated. He can then be re-elected; but he still cannot be seated, in the absence of a constitutional amendment. In order to govern themselves, the people have set certain minimal standards which members of Congress and state legislators must meet.

Among these standards is the requirement that state legislators be bound to support and uphold the Constitution and laws of the United States. The function of this requirement can easily be ascertained from a study of the principles in *New York Times* and *Garrison*. Citizen-comment and the electoral power are of no avail if the representative, entrusted with the legislative power, is not bound to support and uphold the Constitution and laws over which he has been designated guardian.

The Appellant Bond in this case cannot place himself in the role of citizen-critic, for by virtue of his candidacy and election he became the servant of the citizenry. And, any argument based upon the Speech and Debate Clause (Art. I, Sect. 6, Cl. 1) of the United States Constitution

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[6]This allegation may be partially rebutted by the fact that, in debate at the Convention, Mr. Mason admitted that his own opinions at age twenty-one were "too crude and erroneous to merit an influence on public measures." Farrand, *Records*, I, p. 375 (June 22, 1787).

is not relevant, as Mr. Bond was challenged for lack of qualifications prior to being seated. A legislative house may use the power of expulsion if a member demonstrates on the floor a lack of qualifications. It may also determine the qualifications of a member-elect if a proper challenge is made prior to seating. Statements made by U. S. Senators are the business of the United States Senate. A lack of qualifications on Mr. Bond's part addressed itself to the Georgia House of Representatives.

It is not the position of Appellees that legislators do not have the right and the duty of participating in open and robust debate on public issues. This should be done both on the floor of the legislature and in the public forum, for this was one of the special privileges of Mr. Bond. The qualification of allegiance to the Constitution and laws of the United States, and, in this case, of the State of Georgia, was his special responsibility. This Court has on many occasions supported such a requirement of qualifications for other governmental employees. In *Baggett* v. *Bullitt,* 377 U.S. 360, 84 S. Ct. 1316, 12 L. Ed. 2d 377 (1964), the Court stated, at page 379:

> ". . . We do not question the power of a State to take proper measures safeguarding the public service from disloyal conduct."

This Court approved a loyalty oath required by the State of Maryland which denied persons a place on the election ballot unless they make oath that they are not engaged in one way or another in the attempt to overthrow the government by force. *Gerende* v. *Board of Supervisors,* 341 U.S. 56, 71 S. Ct. 565, 95 L. Ed. 745 (1951).

The oath required by Article VI of the United States

Constitution was commented on by this Court in *American Communications Association* v. *Douds,* 339 U.S. 382, 415, 70 S. Ct. 674, 94 L. Ed. 925 (1950) in which this Court noted that the Framers approved a qualification of "minimal loyalty." In *Dennis* v. *United States* (1951), *supra,* the Court held that the purpose of an oath is to protect the legislative processes, not to punish belief.

Even if Mr. Bond's comments were within the area of First Amendment protection, an assumption we have shown to be without merit, the action by the Georgia House does not directly punish his protest and his call for direct defiance of law and order. The adjudication by the Georgia House with respect to his qualifications would be at most an indirect and partial discouragement.

A leading case involving indirect restraint, *American Communications Association* v. *Douds,* 339 U.S. 382, 70 S. Ct. 674, 94 L. Ed. 925 (1950), upheld Section 9 (h) of the Labor-Management Relations Act (Taft-Hartley) of 1947, which withheld the machinery of the NLRB from any labor union where any of its officers had failed to file a "Non-Communist" affidavit affirming nonmembership and nonadvocacy. Here, Congress was not regulating speech, *per se,* but conduct; i.e., political strikes in commerce, and the impingement upon First Amendment freedoms of speech and association was merely an incidental effect of the regulatory statute, in which Congress recognized the very substantial relationship between Communist control of a labor union and the substantive evil "political strikes." In this type case, the "balancing test" applies, for as stated by the Court:

> "When particular conduct is regulated in the interest of public order, and the regulation results in

an indirect, conditional, partial abridgment of speech, the duty of the courts is to determine which of these two conflicting interests demands the greater protection under all the circumstances presented.

* * * *

"In essence, the problem is one of weighing the probable effects of the statute upon the free exercise of the right of speech and assembly against the congressional determination that political strikes are evils of conduct which cause substantial harm to interstate commerce and that Communists and others identified by §9 (h) post continuing threats to that public interest when in positions of union leadership. We must, therefore, undertake the 'delicate and difficult task . . . to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.' *Schneider* v. *Irvington,* 308 U.S. 147, 161 (1939)." *American Communications Association* v. *Douds,* 339 U.S. 382, 399, 70 S. Ct. 674, 94 L. Ed. 925 (1950).

Another well-known indirect restraint is presented in the loyalty-oath cases, where the law seeks regulation not of speech, but of one's qualifications, and the impact upon speech and association is merely incidental to the state's objective of determining the qualifications of municipal employees. *Garner* v. *Board of Public Works of Los Angeles,* 341 U.S. 716, 71 S. Ct. 909, 95 L. Ed. 1317 (1951); public officers, *Gerende* v. *Board of Supervisors of Elections,* 341 U.S. 56, 71 S. Ct. 565, 95 L. Ed. 745 (1951); public school teachers, *Adler* v. *Board of Education of New York,* 342 U.S. 485, 72 S. Ct. 380, 96 L. Ed. 517 (1952); and lawyers, *Konigsberg* v. *State Bar*

of California, 366 U.S. 82, 81 S. Ct. 997, 6 L. Ed. 2d 105 (1961); *In re Anastaplo,* 366 U.S. 82, 81 S. Ct. 978, 6 L. Ed. 2d 135 (1961).

The *Konigsberg* case, *supra,* is particularly instructive, for it involved an undertaking by the state to ascertain a person's qualifications deemed relevant to protection of a legitimate state interest, and this objective, not the curtailment of speech itself, was the end in view. The pursuit of this objective incidentally affected Konigsberg's First Amendment freedoms, and hence the necessity of applying the "balancing test" arose. As stated by the Court:

> "Throughout its history this Court has consistently recognized at least two ways in which constitutionally protected freedom of speech is narrower than an unlimited license to talk. On the one hand, certain forms of speech, or speech in certain contexts, has been considered outside the scope of constitutional protection. (Citing cases.) On the other hand, general regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved. (Citing cases). It is in the latter class of cases that this Court has always placed rules compelling disclosure of prior association as an incident of the informed exercise of a valid governmental function. *Bates* v. *Little Rock,* 361 U.S. 516, 524, 4 L. Ed. 2d 480, 586,

80 S. Ct. 412. Whenever, in such a context, these constitutional protections are asserted against the exercise of valid governmental powers a reconciliation must be effected, and that perforce requires an appropriate weighing of the respective interests involved." *Konigsberg, supra,* at pp. 49, 50, 51.

The public interest involved in this case is the assurance of a loyal legislature as evidenced by the requirements set forth in both the United States Constitution and the Georgia Constitution. The people in governing themselves always hold a valid and necessary interest in self-preservation and in assuring the loyalty of public servants, particularly in high public office. The qualifications of persons in such positions of responsibility is of prime importance, if we are to maintain a government of the people. Without a loyal legislature dedicated to democratic and orderly processes, our democracy cannot function. All citizens of this country and the residents of every State have an interest in the protection of orderly democratic processes. This need is greater than an issue of local or state concern. It is of national importance.

IV. The Adjudication by the House of Mr. Bond's Lack of Qualifications Did Not Violate Substantive Due Process Standards.

Having established that Mr. Bond, as a state legislator, must meet the qualifications set forth in both the federal and state constitutions, and that the Georgia House had the duty of determining those qualifications, it is then necessary to ascertain what standard of review the federal courts should utilize in reviewing the proceedings, assuming that this case presents a justiciable controversy. It is submitted that the standard assumed by the Court below was the correct one.

The trial court in this case held that the review of the controversy should be based upon the principle of separation of powers and on our system of federalism. This standard is particularly appropriate in view of the fact that the Georgia House of Representatives was reapportioned prior to Mr. Bond's election, and that reapportionment was recently upheld by this Court in *Toombs* v. *Fortson,* 384 U.S. 210, 86 S. Ct. 1464, 16 L. Ed. 2d 482 (1966). Perhaps the greatest impact of the reapportionment cases was that they resulted in the strengthening of state government, giving new validity to our federal system of government.

Therefore, this Court is only called upon to determine whether or not the standard employed by the lower court was proper in reviewing the determination of qualifications by a proper representative body of the legislative branch of government. In commenting on the necessity of fair apportionment, this Court said, in *Reynolds* v. *Sims,* 377 U.S. 533, 565, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964):

"Modern and viable state government needs, and the Constitution demands, no less."

The Constitution demands responsible state government. Once it is established, it must be allowed to act in a responsible manner, if there is a rational basis for its actions.

The Court below, after reviewing a number of cases, felt that it should practice restraint in cases involving political questions relating to a particular office, as opposed to those involving the entire system of state government. The Appellees earnestly hope that this Court will agree that the case at bar should be resolved by striking a balance between the principle of separation of powers, the federal system and individual constitutional rights. The result is an inquiry as to whether or not Mr. Bond has been denied due process of law in violation of the Fourteenth Amendment.

The determination of qualifications has been attacked as arbitrary action by the Appellants. They have charged that Mr. Bond was denied a seat on the basis of "insufficient evidence."

The determination of the House cannot be reversed on the ground of "insufficient evidence." The federal courts are not and should not be courts of general review of all actions taken by state legislatures. The courts should only review this matter to determine if basic constitutional standards have been met. This Court, in *Garner* v. *Louisiana,* 368 U.S. 157, 82 S. Ct. 248, 7 L. Ed. 2d 207 (1961), stated that:

"As in Thompson v. Louisville (US) *supra,* our inquiry does not turn on a question of sufficiency of

> evidence to support a conviction, but on whether these convictions rest upon any evidence which would support a finding that the petitioners' acts caused a disturbance of the peace." *Garner* v. *Louisiana, supra,* at p. 163.

In *Thompson* v. *Louisville,* 362 U.S. 199, 80 S. Ct. 624, 4 L. Ed. 2d 654 (1960), the plaintiff was charged with the offense of loitering and disorderly conduct. A city ordinance prohibiting loitering required that three elements be proved:

(1) That the person be without visible means of support, or be unable to give a satisfactory account of himself;

(2) That the person be found sleeping, lying, or trespassing in or about any premises;

(3) Without first having the consent of the owner or manager.

The record showed conclusively that petitioner was able to give a proper account of himself, was merely patting or shuffling his feet to music in a cafe, and had obtained the consent of the manager to be there. As to disorderly conduct, the city only contended that petitioner was "argumentative" when arrested for loitering. This Court reversed the convictions, stating that:

> "Decision of this question turns not on the sufficiency of the evidence, but on whether this conviction rests upon any evidence at all." *Thompson* v. *Louisville, supra,* at p. 199.

In *Garner* v. *Louisiana, supra,* the Court scrutinized the record in a conviction for breach of peace arising

from a sit-in, and reversed the conviction on the grounds that uncontradicted evidence showed that petitioners' conduct was not outwardly boisterous, and that there was no evidence showing that their peaceful conduct might give rise to a disturbance. These two cases merely hold that state action without any evidentiary basis whatsoever may be a denial of due process of law.

In *Schware* v. *Board of Bar Examiners,* 353 U.S. 232, 77 S. Ct. 752, 1 L. Ed. 2d 796 (1957), petitioner was refused admittance to the bar in New Mexico for lack of good moral character. Schware presented ample evidence as to his good character. The State Board refused to admit him because, during the 1930's, he had used aliases, had been arrested, and had been a member of the Communist Party. The Court found that these facts, occurring fifteen years or more prior to his application to practice law, and being rebutted by his subsequent conduct, could not give rise to an inference of lack of good moral character. The Court held that:

> "There is no evidence in the record which rationally justifies a finding that Schware was morally unfit to practice law." *Schware* v. *Board of Bar Examiners, supra,* at p. 246, 247.

In *Konigsberg* v. *State Bar of California, supra,* the Court held that the evidence did not rationally support the finding that petitioner had failed to prove good moral character and that he did not advocate overthrow of the government. In both of these cases, the events relied upon by the state had taken place in the distant past. In both cases, the basic facts were not in dispute. And, in both cases, each applicant introduced more recent evidence bearing directly on the issues. The court

only held that there was no rational justification, in light of all the circumstances, for the drawing of inferences that the applicants did not possess good moral character.

In the case at bar, Mr. Bond's statements obviously constitute some evidence as to his ability to uphold and support the United States Constitution and valid laws enacted pursuant thereto. His statements constitute direct evidence, and thus are not affected by the *Thompson* v. *Louisville* doctrine. *Cox*. v. *Louisiana,* 379 U.S. 559, 567, 85 S. Ct. 476, 13 L. Ed. 2d 487 (1964). The Selective Service Act, 50 USC § 451, et seq., is a valid statute enacted pursuant to Art. I, Sec. 8, Cl. 12 of the United States Constitution. See *Gara* v. *United States,* 178 F. 2d 38 (6th Cir. 1949), aff'd. 340 U.S. 857, 71 S. Ct. 87, 95 L. Ed. 628 (1950).

The statements either endorsed by the plaintiff or made by him have been set forth at length in this brief, and are contained in their entirety in the record. Can this Court say that those statements do not furnish rational support for the determination that the plaintiff was not qualified to take the oath of office?[7]

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[7]The present leader of the Student Non Violent Coordinating Committee has apparently interpreted his organization's position to be stronger than counsel for Appellants admit. Mr. Stokely Carmichael has urged Negroes to refuse to serve in the U. S. armed forces. He stated:

> "Any black man who fights in this country's Army is a black mercenary," Carmichael told about 600 persons attending a rally of the Congress of Racial Equality Friday night.
>
> "When Johnson calls, let's band together and say, 'Hell no, I'm not going'."

Carmichael also gave these definitions of black power:

An examination of the statements issued by the Student Non Violent Coordinating Committee or of the endorsement by Mr. Bond understates the turbulent reality of the issue in question. Public Law 88-408, a resolution affirming President Johnson's action with respect to the conflict in Viet Nam, was passed by the Eighty-eighth session of Congress. During the early part of 1966 there were approximately 197,300 men of the U. S. Military Forces stationed in South Viet Nam; 70,000 members of the Seventh Fleet Task Force were on duty in Southeast Asia. The U. S. Congress for 1965 had appropriated one billion seven hundred million dollars for this conflict and there was pending at that time an appropriation bill of 12 billion 700 million dollars to continue the struggle in Viet Nam. (R. 185.)

The statement made by the Student Non Violent Coordinating Committee was a vicious attack on this commitment. Mr. Bond did more than endorse the attack. Mr. Bond stated that he was "eager and anxious to encourage people not to participate in it (the war in Viet Nam) for any reason that they choose . . ." (R. 111.)

"When you talk of black power, you talk of building a movement that will smash everything Western civilization has created.

"When you talk of black power, you talk of bringing this country to its knees.

"When you talk of black power, you talk of picking up where Malcolm X left off.

"When you talk of black power, you talk of the black man doing whatever is necessary to get what he needs . . . we are fighting for our lives."

Cleaveland, August 6, 1966 (UPI) *The Atlanta Journal and Constitution,* Sunday, August 7, 1966.

He stated that ". . . the fact that the United States Government fights a war in Viet Nam, I don't think that I as a second class citizen of the United States have a requirement to support that war." (R. 112.) He stated that if his comments were treasonable he didn't know if he could stand by them. (R. 113.)

Mr. Bond's statements probably constitute a violation of 50 U.S.C. § 462, but even if they do not, they certainly bear upon Mr. Bond's ability to uphold and support the Constitution. It is true that there was evidence of a general nature relating to his good character at the hearing. And, he has stated that he does not advocate the violation of laws. But, he never refuted nor explained his statements previously made. Here, unlike in the first *Konigsberg* case, there is no direct evidence in his favor bearing on the issue of his qualifications. The House did not draw unfavorable inferences from the evidence; there was evidence which showed the members that Mr. Bond was not qualified to take the oath of office. In *Cox* v. *Louisiana, supra,* at 567, the Court held that the State of Louisiana had the right to infer criminal intent from circumstantial evidence. In this case, could not the Georgia House of Representatives simply give the greater credence to the direct evidence from the plaintiff's own lips, and determine that he was not qualified? Cannot the Georgia House interpret the position of the Student Non Violent Coordinating Committee endorsed by Mr. Bond as the leader of that organization, Mr. Stokely Carmichael, interprets it?

It may be that Mr. Bond is qualified for office. Perhaps the House should have disregarded his more extreme statements and seated him. But, the Constitutional standards have been met. There was some evidence, rela-

tive to his qualifications, constituting a rational basis for the action of the House. It is not the function of this Court to substitute its judgment for that of the House. As the Supreme Court stated in *Re Anastaplo,* 366 U.S. 82, 97, 81 S. Ct. 978, 6 L. Ed. 2d 135 (1961):

> "We conclude with observing that our function here is solely one of constitutional adjudication, not to pass judgment on what has been done as if we were another state court of review, still less to express any view upon the wisdom of the State's action."

V. Judicial Acts of a Legislative Body, Specifically Authorized As to Member Qualifications, Cannot Be a Legislative Bill of Attainder or an Ex Post Facto Law.

It seems self-evident that the action of the Georgia House of Representatives, resulting in a House Resolution, No. 19, cannot possibly be a Bill of Attainder or ex post facto law. Whatever its character, and whatever the merits or demerits of the action of the House, the resulting legislative act does not fit into either of those categories. Any such construction would void provisions in both the United States Constitution and most, if not all, state constitutions.

Article I, Section 2, Clause 5, of the Constitution of the United States vests in the House of Representatives the power of impeachment. Article I, Section III, Clause 6, of the United States Constitution vests in the Senate sole power to try all impeachments. Finally, Article I, Section 3, Clause 7, of the United States Constitution provides that judgments in cases of impeachment shall not extend beyond removal from office and disqualification to hold and enjoy offices under the United States. An impeachment, like an adjudication on qualifications, is an act by a legislative body sitting in a judicial character. This was made clear in *Barry* v. *United States,* 279 U.S. 597, 49 S. Ct. 452, 73 L. Ed. 867 (1929):

> "Generally, the Senate is a legislative body, exercising in connection with the House only the power to make laws. But it has had conferred upon it by the Constitution certain powers, which are not legislative, but judicial, in character. Among these is the power to judge of the elections, returns, and quali-

fications of its own members." *Barry* v. *United States, supra,* at p. 613.

The Constitution of the United States, in Article I, Section 9, Clause 3, prohibits Congress from passing Bills of Attainder or ex post facto laws. The construction of the Bill of Attainder clause sought by the Appellants in this case would automatically nullify the above-cited provisions dealing with impeachments, as the Act resulting from an impeachment would be, under their definition, a Bill of Attainder and ex post facto law.

The Georgia House of Representatives is given the power under the Georgia Constitution to judge the qualifications of its members. Article III, Section VII, Para. 1, of the Georgia Constitution. The State Constitution thus, in this instance, specifically allows the legislative body to sit in a judicial capacity. As has been pointed out before, the Constitution of the United States also authorizes the United States House of Representatives to sit as the tribunal to judge the qualifications of its members. In *United States* v. *Brown,* 381 U.S. 437, 446, 85 S. Ct. 1707, 14 L. Ed. 2d 484 (1965), this Court held that:

> "By banning bills of attainder, the Framers of the Constitution sought to guard against such dangers by limiting legislatures to the task of rule-making."

In the context of the *Brown* case, the Court's holding was eminently sound. But in the case at bar, the legislature has been given the specific power to sit as a judicial body. Therefore, the analysis of Attainder and ex post facto in *Brown* is simply not applicable to this case.

Furthermore, the refusal to seat Mr. Bond is not "punishment" within the meaning of either the Bill of

Attainder or ex post facto prohibitions. Historically, ex post facto laws were defined as the laws which made an act criminal after its commitment, or which changed the status of a party to his disadvantage. *Lindsey* v. *Washington,* 301 U.S. 397, 57 S. Ct. 797, 81 L. Ed. 1182 (1937). Mr. Bond was not punished for past or present activities. He was not challenged for his statements on January 6, 1966, or for any other statements. He was challenged on the grounds that on January 10, 1966, he did not possess the requisite qualifications for office demanded by both the United States Constitution and the Constitution of Georgia. He was refused a seat for a present lack of qualifications.

In *United States* v. *Brown, supra,* an act of Congress prohibited members of the Communist Party from holding union offices. In that case, the act was a Bill of Attainder in that it, in itself, adjudicated the guilt of, and visited punishment upon, a specified group. Under the Constitution of the United States, Archie Brown had a right not to be deprived of union office for the reasons enumerated in the act of Congress. As pointed out in *Snowden* v. *Hughes, supra,* there is no substantive right under the Fourteenth Amendment to public office. Therefore, deprivation of public office cannot be "punishment" as contemplated by the Bill of Attainder clause.

The theory that the constitutionally authorized action of a legislative body in determining the qualifications of its members can constitute a Bill of Attainder is novel indeed. Bills of Attainder are discussed extensively in 63 Yale L.J. 844, Note: *"The Constitutional Prohibition of Bills of Attainder: A Waning Guaranty of Judicial Trial."* Footnote 32 of that article points out that in

some areas, such as that of expelling members for lack of qualifications, a legislature has "unquestionable" authority. Conceivably a determination of qualifications could deprive a member of federally protected rights, such as procedural due process of law. As previously indicated, it could not seriously be maintained that a state legislature could determine that a member-elect was not qualified because he was a Negro. That would violate the Fourteenth Amendment of the Constitution of the United States. But, even in that unlikely case, it could not be maintained that the result of the procedure itself was a Bill of Attainder or ex post facto law. In that instance, the ground of disqualification itself would be invalid, and would violate the Constitution of the United States.

The Appellant's contention that the legislative act of the Georgia House constituted either a Bill of Attainder or ex post facto law is frivolous, and not worthy of this Court's attention. As Congress itself is given the power in the United States Constitution to determine the qualifications of its members, it seems clear that a resolution containing the result of such a determination of qualifications by Congress could not be a Bill of Attainder or ex post facto law, which the Congress has no power to enact. And, the result of the determination authorized by the provision of the Georgia Constitution, identical to that of the United States Constitution, simply is not a Bill of Attainder or ex post facto law.

VI. An Adjudication with Respect to the Constitutional Qualification of a Person Elected to a Legislative Body Does Not Deprive the Electorate of Their Vote or Deny Them a Republican Form of Government.

One of the many spurious issues in this case should be laid to rest, at this time, for the benefit of all concerned. Mr. Bond was not denied a seat in the Georgia House of Representatives because of his race. At every stage of this litigation. Appellants have sought to imply an issue of racial discrimination, without meeting the issue on the facts. It is as if they seek to sway the decision of this Court by mental suggestion.

There simply is no "racial background of the current dispute" for this Court to consider. To infer such a "realistic" approach would be to declare, as a principle of law, that every case involving members of more than one race has a racial background. To charge that Georgia has in the past discriminated against Negroes, and then to infer that the charge is somewhat relevant to the issues in this case is not legitimate legal technique.

The Court below did not dismiss this charge merely for lack of direct evidence, but rather held that:

> "The contention that Mr. Bond was denied his seat because of his race was resolved adversely to him from the bench during the hearing of this matter. To support this contention it was urged that Mr. Bond was a Negro; that SNCC was a militant civil rights organization; and that the question of race was inextricably related to each and every statement forming the basis of the challenge. This logic would create license in the name of race. Fur-

thermore, seven Negroes, as stated, were seated on the same day as representatives. Two served on the special challenge committee at the request of Mr. Bond; two Negro senators appeared before the committee as character witnesses for him; and two of the Negro representatives spoke on the floor of the House for him before the final vote. *The charge of racial discrimination and thus of denial of equal protection of law is without foundation in fact."* (Emphasis added.) (R. 141.)

The only legitimate issues in this area are resolved against the Appellants.

Mr. Julian Bond, one of the Appellants in this case was refused his seat as a member of the Georgia House of Representatives after having been duly elected by the voters of House District 136 for the session of the General Assembly commencing January 10, 1966.

Dr. Martin Luther King and Mrs. Arel Keyes, the other Appellants, seeking to represent the citizens and voters of House District 136 as a class, allege a denial of their constitutional rights to vote and to a republican form of government.

Dr. King and Mrs. Keyes are residents of the District but Dr. King is not registered to vote in District 136. He is registered to vote in another District.

Neither Appellant Dr. King nor Mrs. Keyes, nor the alleged class which they represent, have any standing in this case to raise constitutional provisions alleged to be violated by the failure of the Georgia House of Representatives to seat Mr. Julian Bond.

This Court has held in numerous decisions that in

order to challenge the constitutionality of a statute a party plaintiff must show some immediate direct injury. *Liverpool, N. Y. and P. Steamship Company* v. *Comm. of Emigration,* 113 U.S. 33, 5 S. Ct. 352, 28 L. Ed. 899 (1885).

This Court stated in the case of *Commonwealth of Massachusetts* v. *Mellon,* 262 U.S. 447, 488; 43 S. Ct. 597, 601; 67 L. Ed. 1078 (1923):

> "The party who invokes the power must be able to show, not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."

The question of standing was discussed in *Baker* v. *Carr,* 369 U.S. 186, 204; 82 S. Ct. 691, 703; 7 L. Ed. 2d 663 (1962), where the Court said:

> "Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing."

The qualified voters of the 136th House District have not been deprived of their right of representation in the Georgia House of Representatives. Georgia Code Section 34-805 provides that the Governor must call a special election to fill a vacancy within ten days of such vacancy. A temporary lack of representation does not deprive the voters in a district of their constitutional right of representation. In the case of *Barry* v. *United States,* 279 U.S.

597, 616; 49 S. Ct. 452, 456 (1929), the Court held:

> "The temporary deprivation of equal representation which results from the refusal of the Senate to seat a member pending inquiry as to his election or qualifications is the necessary consequence of the exercise of a constitutional power, and no more deprives the state of its 'equal suffrage' in the constitutional sense than would a vote of the Senate vacating the seat of a sitting member or a vote of expulsion."

Even if the adjudication by the House of Representatives had been improper, which is specifically denied, Appellants Dr. King and Mrs. Keyes and the class which they allegedly represent have not been deprived of any constitutional rights. A party must show, in order to have standing to attack the validity of a statute, some direct injury to himself. *McGowen* v. *Maryland,* 366 U.S. 420, 429; 81 S. Ct. 1101; 6 L. Ed. 2d 393 (1961). And, cases have held that persons can only assert the rights of others when it would be difficult for those others to maintain a suit. *Heilberg* v. *Fixa,* 236 F. Supp. 405 (1964-Calif.); *Barrers* v. *Jackson,* 346 U.S. 249, 255, 256, 257; 73 S. Ct. 1031; 97 L. Ed. 1586 (1953). In this case, the only party who could possibly have standing to question the action of the Georgia House of Representatives is Mr. Julian Bond.

The reapportionment cases have held that voters have standing in constitutional cases in some certain and specific instances. *Baker* v. *Carr, supra,* held that voters in Tennessee had standing to attack malapportionment imposed by State legislators. The Court held in *Baker* v. *Carr* that voters who alleged facts showing disadvantages to themselves as individuals had standing to sue. A mal-

apportioned representative body places those voters on an unequal footing, vis-a-vis, other voters in the State. *Gray* v. *Sanders,* 372 U.S. 368; 83 S. Ct. 801; 9 L. Ed. 2d 821, held that any person whose right to vote was impaired by the conduct of elections had standing to sue.

In this case, the rights of Appellants Dr. King and Mrs. Keyes have not been violated. It is clear since *Toombs* v. *Fortson,* 241 F. Supp. 65 (N.D. Ga. 1964), that these voters were not placed on an unequal footing with other voters. After the qualified voters in the district exercised their right to vote and after their votes were counted and totally unconnected with that exercise, the House of Representatives refused to seat Mr. Bond on the ground that he was not then properly qualified to hold the office. This action in no way affected the right of Appellants Dr. King and Mrs. Keyes to vote. These Appellants cannot maintain that their constitutional rights have been violated merely because the person elected is not seated in the General Assembly of Georgia.

Article I, Section 3, Paragraph 3, of the Constitution of the United States provides that no person shall be a United States Senator who shall not have attained the age of thirty years. Can it be said that a citizen-voter has been denied representation or has had his vote impaired or denied, or has been denied a republican form of government because his vote was cast for a candidate who was not qualified because of age? The United States Senate would be required to deny a seat to an underage Senator-elect. The case with respect to Mr. Bond is of the same character.

Neither Dr. King nor Mrs. Keyes alleged that the election machinery available in Georgia to fill vacancies was

inadequate to restore representation. If, after an election, an elected representative had legally been declared to be underage, he would not be entitled to take his seat. It would be ridiculous to maintain that constitutional voting rights would be violated by such an adjudication of lack of constitutional qualification.

As for Dr. King, it has been held that only a citizen who is a legal voter in a district where his rights are impinged would have standing to bring suit. *League of Nebraska Municipalities* v. *Marsh,* 209 F. Supp. 189 (1962). Dr. King was not legally qualified to vote in the election in question. (R. 120.) The fact that Dr. King has strong personal beliefs and convictions with respect to the issues before the Court or that he earned and received a Nobel Peace Prize will not give him standing as a party plaintiff. There are no facts alleged in the complaint that give Appellant Dr. King standing either individually or as the representative of a class.

CONCLUSION

The decision of the Court below should be affirmed or in the alternative, the case should be dismissed for lack of a justiciable issue.

The purpose of the Constitutional provisions and principles involved in the case at bar is to insure the right of the people to self-government. This concept of self-government is the unique feature of our political system. The function of the courts should be to support and uphold this concept.

Our Constitution creates a fundamental distinction between the people and their political servants. The citizens have the right and the duty to speak freely on public issues, and to criticize those entrusted with public duty. The representatives of the people, including state legislators, are required to support the fundamental law which provides for self-government.

The people must have the power and authority to take proper measures safeguarding the public service from disloyal conduct, else their liberties cannot long endure.

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IN THE

Supreme Court of the United States

October Term, 1966

No. 87

JULIAN BOND, ET AL.,

Appellants,

v.

JAMES "SLOPPY" FLOYD, ET AL.,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA (ATLANTA DIVISION)

APPELLANTS' REPLY BRIEF

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA (ATLANTA DIVISION)

APPELLANTS' REPLY BRIEF

I

The refusal to seat Mr. Bond raises justiciable issues.

A. Appellees argue that the determination of a legislative member's "qualifications" is "[g]enerally" held to be a matter solely within the jurisdiction of the legislature itself (Br. 12).* They recognize that under the principles of *Gomilion* v. *Lightfoot,* 364 U.S. 339, the rule cannot be an absolute one (Br. 14).

Assuming *arguendo* the general rule, it is clear that it does not govern this case. First, the legislature did not

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* "Br." refers to appellees' brief.

find that Mr. Bond failed to meet a qualification specifically set forth in Georgia's constitution. Second, the legislature's action was based upon Mr. Bond's public expressions on national issues protected by the First Amendment and by the due process and privileges and immunities provisions of the Fourteenth Amendment.

No case cited by appellees involved rights of this kind; the principal ones expressly left the way open for the federal protection of such rights.

The opinion in *Taylor and Marshall* v. *Beckham,* 178 U.S. 548, the case principally relied upon by appellees begins with the observation that the state's power over its own elections must be free from external interference "except so far as plainly provided by the Constitution of the United States", *id.* at 571, and that "the cases must necessarily be rare in which the interference of this Court can properly be invoked", *ibid.* This Court then rejected the claim that a legislature's determination of gubernatorial elections had failed to follow statutory procedures and was not supported by the evidence.

The Court disposed of the due process argument by agreeing with the Kentucky Court of Appeals that the right to hold state elective office was not properly protected by the Fourteenth Amendment; and it also held that the enforcement of the guarantee of a republican form of government is the province of the political department. In *Baker* v. *Carr,* 369 U.S. 186, 223, 231, 284, this Court made clear the limited principle upon which *Taylor* rests.

This is emphasized by the Court's approving reference in the *Taylor* and *Baker* opinions to several earlier cases of appropriate federal court jurisdiction over state election cases. One was *Boyd* v. *Thayer,* 143 U.S. 135, where the Court reversed a judgment of the Supreme Court of Nebraska that an elected candidate was ineligible for gubernatorial office because he had not been a United States

citizen for two years preceding his election. "Arrival at this conclusion", said the Court, "involved the denial of a right or privilege under the Constitution and laws of the United States, upon which the determination of whether Boyd was a citizen of the United States or not depended, and jurisdiction to review a decision against such right or privilege necessarily exists in this tribunal", *id.* at 161. So, here, where the right or privilege is that of public expression on national issues.

The second case cited in *Taylor* and in *Baker* was that of *Kennard* v. *Louisiana*, 92 U.S. 480, where the Court reviewed the right to office of a Louisiana Supreme Court justice. Jurisdiction was assumed because of a challenge made to the constitutionality of the relevant Louisiana statute.

The other cases cited by appellees do not change the rule that federal constitutional rights will be protected even in state election cases.

(1) *Walton* v. *House of Representatives of the State of Oklahoma*, 265 U.S. 487, was a suit by the Governor of Oklahoma to enjoin impeachment proceedings allegedly based upon improper motives and before a similarly motivated court of impeachment. This was claimed to be a denial of due process and equal protection.

(2) *Elder* v. *Colorado*, 204 U.S. 85, was an election contest case where "if there had been an assertion of a right, title, privilege or immunity . . . it would have been so frivolous as not to afford a basis of jurisdiction", *id.* at 88, 89.

(3) *Snowden* v. *Hughes*, 321 U.S. 1, did not involve a right or privilege "of national citizenship which alone is protected by the privileges and immunities clause", *id.* at 7. The Court emphasized this absence of a federal constitutional claim by noting that "[t]here is no allegation of any facts tending to show that in refusing to certify petitioner as a nominee, the Board was making any inten-

tional or purposeful discrimination between persons or classes", *ibid.*

It thus appears that contrary to appellees' assertion there is no "long standing policy" (Br. 17) against the review of a claim that federal constitutional rights were violated. Such a policy would have been inconsistent with this Court's recent statement that "such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right", *Gomillion v. Lightfoot, supra,* at 347. Indeed, it is expressly disposed of by this Court's conclusion in *Baker* v. *Carr,* 369 U.S. 186, 229:

> "When challenges to state action respecting matters of 'the administration of the affairs of the state and the officers through whom they are conducted' have rested on claims of constitutional deprivation which are amenable to judicial correction, this Court has acted upon its view of the merits of the claim."

B. Appellees further seek to achieve insulation from judicial review by noting the desirability of giving finality to the political department and the problem of satisfactory criteria for a judicial determination, citing *Coleman* v. *Miller,* 307 U.S. 433, 454-55 (Br. 17). As to finality, there cannot properly be a state "power of self protection" (Br. 18) to violate federal constitutional rights. Nothing in *In re Chapman,* 166 U.S. 661, 668, cited by appellees is to the contrary.

There is no lack of "satisfactory criteria" (Br. 18, 19) in determining whether Mr. Bond's public expressions of opinion are federally protected. This is precisely the area of judicial expertise in an infinite variety of situations in which federal constitutional rights are customarily determined and vindicated.

II

The House does not have the power to determine that a legislator cannot conscientiously take the oath. Nor was there any basis for such a conclusion in the present case.

It is not for a legislative majority to decide that the public expressions of opinion establish an absence of "ability to support and uphold the constitution and laws of the United States" (Br. 25).

Such an exercise of power has no standards whatsoever; it conflicts with the precise statement of qualifications in the State Constitution; it imposes disqualification for the exercise of a federal privilege and immunity; and the electorate. It also exercises a restraint upon free speech upon a most critical problem in our national life where the voice of government is always more powerful than that of dissent. See Finman and Macaulay, *Freedom to Dissent: The Vietnam Protests and the Words of Public Officials*, 1966 Wisc. Law Rev. 632.

Neither directly nor by inference do the cases cited by appellees support their argument. We do not deal here with state employees, *Baggett* v. *Bullitt*, 377 U.S. 360, or even with labor unions seeking the facilities of the National Labor Relations Board, *American Communications Association* v. *Douds*, 339 U.S. 382; but see *United States* v. *Brown*, 381 U.S. 437. The choice of the electorate for public office is not subject to the same managerial or administrative control by government officials.

Beyond this, two distinctions are to be noted: (1) In neither of the cases cited by appellees did the government involved refuse to permit the oath to be taken; the suits were instituted by persons unwilling to take the oath; similarly in *Gerende* v. *Board of Supervisors*, 341 U.S. 56.

(2) There is no indication in the present case of any "disloyal conduct", *Baggett* v. *Bullitt*, *supra* at 379. When this Court referred to "proper measures safeguarding the public service from disloyal conduct", *ibid.*, it was certainly not suggesting that public expressions of opinion fall under that rubric. This is confirmed by the Court's recent decision in *Elfbrandt* v. *Russell*, 384 U.S. 11.

Appellees' suggestion that the Georgia legislature, with its open record of disregard for democratic processes and constitutional rights,* "Seeks the Protection of Democratic Processes for the People" (Br. 26) by disregarding their votes is matched with equal irony by the appellees' attempt to rely upon that great philosopher and political scientist Professor Alexander Meiklejohn. Nothing which Dr. Meiklejohn wrote in the excerpts in appellees' brief or in his important writings elsewhere supports appellees' suggestion that the legislature can reject the votes of the people and decide that an elected member cannot conscientiously take the oath of office.

The decisions cited by the appellees are quite beside the point. What the appellees did here finds no support in criminal prosecutions under the Smith Act, *Dennis* v. *United States*, 341 U.S. 494, or in the state's right to determine the qualifications of its employees or of prospective members of the bar (Br. 41-42). Nor is it fair to infer from the press interviews with Mr. Bond either indecision as to treason (Br. 29) or advocacy of the violation of law by others (Br. 29, 48).

Appellees do not help their argument that the legislature met "substantive due process standards" in January by citing remarks made in August, 1966, by the present head of the Student Non-Violent Coordinating Committee (Br. 48-49, n. 7). The suggestion that an elected legislator

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* See brief *amicus curiae* herein of the National Association for the Advancement of Colored People, pp. 5-19.

must offer "direct evidence in his favor bearing on the issue of his qualifications (Br. 50), *i.e.*, good character as in *Konigsberg* v. *State Bar of California*, 366 U.S. 82, merely bears out the legislative body's unlawful arrogation of the electorate's power and the violation of federally protected rights.

CONCLUSION

The judgment of the District Court should be reversed with instructions to enter judgment for the relief demanded in the complaint.

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November 4, 1966.

SUPREME COURT OF THE UNITED STATES

No. 87.—October Term, 1966.

Julian Bond et al., Appellants, *v.* James "Sloppy" Floyd et al.	On Appeal From the United States District Court for the Northern District of Georgia.

[December 5, 1966.]

Mr. Chief Justice Warren delivered the opinion of the Court.

The question presented in this case is whether the Georgia House of Representatives may constitutionally exclude appellant Bond, a duly elected Representative, from membership because of his statements, and statements to which he subscribed, criticising the policy of the Federal Government in Vietnam and the operation of the Selective Service laws. An understanding of the circumstances of the litigation requires a complete presentation of the events and statements which led to this appeal.

Bond, a Negro, was elected on June 15, 1965, as the Representative to the Georgia House of Representatives from the 136th House District. Of the District's 6,500 voters, approximately 6,000 are Negroes. Bond defeated his opponent, Malcolm Dean, Dean of Men at Atlanta University, also a Negro, by a vote of 2,320 to 487.

On January 6, 1966, the Student Nonviolent Coordinating Committee, a civil rights organization of which Bond was then the Communications Director, issued the following statement on American policy in Vietnam and its relation to the work of civil rights organizations in this country:

"The Student Nonviolent Coordinating Committee has a right and a responsibility to dissent with

United States foreign policy on an issue when it sees fit. The Student Nonviolent Coordinating Committee now states its opposition to United States' involvement in Viet Nam on these grounds:

"We believe the United States government has been deceptive in its claims of concern for freedom of the Vietnamese people, just as the government has been deceptive in claiming concern for the freedom of colored people in such other countries as the Dominican Republic, the Congo, South Africa, Rhodesia and in the United States itself.

"We, the Student Nonviolent Coordinating Committee, have been involved in the black people's struggle for liberation and self-determination in this country for the past five years. Our work, particularly in the South, has taught us that the United States government has never guaranteed the freedom of oppressed citizens, and is not yet truly determined to end the rule of terror and oppression within its own borders.

"We ourselves have often been victims of violence and confinement executed by United States government officials. We recall the numerous persons who have been murdered in the South because of their efforts to secure their civil and human rights, and whose murderers have been allowed to escape penalty for their crimes.

"The murder of Samuel Young in Tuskegee, Ala., is no different than the murder of peasants in Viet Nam, for both Young and the Vietnamese sought, and are seeking, to secure the rights guaranteed them by law. In each case, the United States government bears a great part of the responsibility for these deaths.

"Samuel Young was murdered because United States law is not being enforced. Vietnamese are

murdered because the United States is pursuing an aggressive policy in violation of international law. The United States is no respecter of persons or law when such persons or laws run counter to its needs and desires.

"We recall the indifference, suspicion and outright hostility with which our reports of violence have been met in the past by government officials.

"We know that for the most part, elections in this country, in the North as well as the South, are not free. We have seen that the 1965 Voting Rights Act and the 1964 Civil Rights Act have not yet been implemented with full federal power and sincerity.

"We question, then, the ability and even the desire of the United States government to guarantee free elections abroad. We maintain that our country's cry of 'preserve freedom in the world' is a hypocritical mask behind which it squashes liberation movements which are not bound, and refuse to be bound, by the expediences of United States cold war policies.

"We are in sympathy with, and support, the men in this country who are unwilling to respond to a military draft which would compel them to contribute their lives to United States aggression in Viet Nam in the name of the 'freedom' we find so false in this country.

"We recoil with horror at the inconsistency of a supposedly 'free' society where responsibility to freedom is equated with the responsibility to lend oneself to military aggression. We take note of the fact that 16 per cent of the draftees from this country are Negroes called on to stifle the liberation of Viet Nam, to preserve a 'democracy' which does not exist for them at home.

"We ask, where is the draft for the freedom fight in the United States?

"We therefore encourage those Americans who prefer to use their energy in building democratic forms within this country. We believe that work in the civil rights movement and with other human relations organizations is a valid alternative to the draft. We urge all Americans to seek this alternative, knowing full well that it may cost them lives—as painfully as in Viet Nam."

On the same day that this statement was issued, Bond was interviewed by telephone by a reporter from a local radio station, and, although Bond had not participated in drafting the statement, he endorsed the statement in these words:

"Why, I endorse it, first, because I like to think of myself as a pacifist and one who opposes that war and any other war and eager and anxious to encourage people not to participate in it for any reason that they choose; and secondly, I agree with this statement because of the reason set forth in it—because I think it is sorta hypocritical for us to maintain that we are fighting for liberty in other places and we are not guaranteeing liberty to citizens inside the continental United States.

. . . . .

"Well, I think that the fact that the United States Government fights a war in Viet Nam, I don't think that I as a second class citizen of the United States have a requirement to support that war. I think my responsibility is to oppose things that I think are wrong if they are in Viet Nam or New York, or Chicago, or Atlanta, or wherever."

When the interviewer suggested that our involvement in Vietnam was because "if we do not stop Communism there that it is just a question of where will we stop it next," Bond replied:

> "Oh, no, I'm not taking a stand against stopping World Communism, and I'm not taking a stand in favor of the Viet Cong. What I'm saying that is, first, that I don't believe in that war. That particular war. I'm against all war. I'm against that war in particular, and I don't think people ought to participate in it. Because I'm against war, I'm against the draft. I think that other countries in the World get along without a draft—England is one—and I don't see why we couldn't, too.
>
> . . . . .
>
> ". . . I'm not about to justify that war, because it's stopping International Communism, or whatever—you know, I just happen to have a basic disagreement with wars for whatever reason they are fought— . . . [F]ought to stop International Communism, to promote International Communism, or for whatever reason. I oppose the Viet Cong fighting in Viet Nam as much as I oppose the United States fighting in Viet Nam. I happen to live in the United States. If I lived in North Viet Nam I might not have the same sort of freedom of expression, but it happens that I live here—not there."

The interviewer also asked Bond if he felt he could take the oath of office required by the Georgia Constitution, and Bond responded that he saw nothing inconsistent between his statements and the oath. Bond was also asked whether he would adhere to his statements if war were declared on North Vietnam and if his statements might become treasonous. He replied that he did

not know "if I'm strong enough to place myself in a position where I'd be guilty of treason."

Before January 10, 1966, when the Georgia House of Representatives was scheduled to convene, a petition challenging Bond's right to be seated was filed by 75 House members. This petition charged that Bond's statements gave aid and comfort to the enemies of the United States and Georgia, violated the Selective Service laws, and tended to bring discredit and disrespect on the House. The petition further contended that Bond's endorsement of the SNCC statement "is totally and completely repugnant to and inconsistent with the mandatory oath prescribed by the Constitution of Georgia for a member of the House of Representatives to take before taking his seat." For the same reasons, the petition asserted that Bond could not take an oath to support the Constitution of the United States. When Bond appeared at the House on January 10 to be sworn in, the clerk refused to administer the oath to him until the issues raised in the challenge petition had been decided.

Bond filed a response to the challenge petition in which he stated his willingness to take the oath and argued that he was not unable to do so in good faith. He further argued that the challenge against his seating had been filed to deprive him of his First Amendment rights, and that the challenge was racially motivated. A special committee was appointed to report on the challenge, and a hearing was held to determine exactly what Bond had said and the intentions with which he had said it.

At this hearing, the only testimony given against Bond was that which he himself gave the committee. Both the opponents Bond had defeated in becoming the Representative of the 136th District testified to his good character and to his loyalty to the United States. A recording of the interview which Bond had given to the reporter after the SNCC statement was played, and Bond was

called to the stand for cross-examination. He there admitted his statements and elaborated his views. He stated that he concurred in the SNCC statement "without reservation," and, when asked if he admired the courage of persons who burn their draft cards, responded:

> "I admire people who take an action, and I admire people who feel strongly enough about their convictions to take an action like that knowing the consequences that they will face, and that was my original statement when asked that question.
>
> . . . . .
>
> "I have never suggested or counseled or advocated that any one other person burn their draft card. In fact, I have mine in my pocket and will produce it if you wish. I do not advocate that people should break laws. What I simply try to say was that I admired the courage of someone who could act on his convictions knowing that he faces pretty stiff consequences."

Tapes of an interview Bond had given the press after the clerk had refused to give him the oath were also heard by the special committee. In this interview, Bond stated:

> "I stand before you today charged with entering into public discussion on matters of National interest. I hesitate to offer explanations for my actions or deeds where no charge has been levied against me other than the charge that I have chosen to speak my mind and no explanation is called for, for no member of this House, has ever, to my knowledge, been called upon to explain his public statements for public postures as a prerequisite to admission to that Body. I therefore, offer to my constituents a statement of my views. I have not counselled burning draft cards, nor have I burned

mine. I have suggested that congressionally outlined alternatives to military service be extended to building democracy at home. The posture of my life for the past five years has been calculated to give Negroes the ability to participate in formulation of public policies. The fact of my election to public office does not lessen my duty or desire to express my opinions even when they differ from those held by others. As to the current controversy because of convictions that I have arrived at through examination of my conscience I have decided I personally cannot participate in war.

"I stand here with intentions to take an oath—that oath they just took in there—that will dispel any doubts about my convictions or loyalty."

The special committee concluded in its report to the House that Bond's endorsement of the SNCC statement and his supplementary remarks showed that he "does not and will not" support the Constitutions of the United States and of Georgia, that he "adheres to the enemies of the State of Georgia" contrary to the State Constitution, that he gives aid and comfort to the enemies of the United States, that his statements violated the Selective Service Act, 50 U. S. C. § 462, and that his statements "are reprehensible and are such as tend to bring discredit to and disrespect of the House." On the same day the House adopted the committee report without findings and without further elaborating Bond's lack of qualifications, and resolved by a vote of 184 to 12 that "Bond shall not be allowed to take the oath of office as a member of the House of Representatives and that Representative-Elect Julian Bond shall not be seated as a member of the House of Representatives."

Bond then instituted an action in the District Court for the Northern District of Georgia for injunctive re-

lief and a declaratory judgment that the House action was unauthorized by the Georgia Constitution and violated Bond's rights under the First Amendment. A three-judge District Court was convened under 28 U. S. C. § 2281. All three members of the District Court held that the court had jurisdiction to decide the constitutionality of the House action because Bond had asserted substantial First Amendment rights.[1] On the merits, however, the court was divided.

Judges Bell and Morgan, writing for the majority of the court, addressed themselves first to the question of whether the Georgia House had power under state law to disqualify Bond based on its conclusion that he could not sincerely take the oath of office. They reasoned that separation of powers principles gave the Legislature power to insist on qualifications in addition to those specified in the State Constitution. The majority pointed out that nothing in the Georgia Constitution limits the qualifications of the legislators to those expressed in the constitution.

Having concluded that the action of the Georgia House was authorized by state law, the court considered whether Bond's disqualification violated his constitutional right of freedom of speech. It reasoned that the decisions of this Court involving particular state political offices supported an attitude of restraint in which the principles of separation of powers and federalism should be balanced against the alleged deprivation of individual constitutional rights. On this basis, the majority below fashioned the test to be applied in this case as being whether the refusal to seat Bond violated procedural or what it termed substantive due process. The court held that the hearing which had been given Bond

[1] The opinion of the District Court is reported at 251 F. Supp. 333 (1966).

by the House satisfied procedural due process. As for what it termed the question of substantive due process, the majority concluded that there was a rational evidentiary basis for the ruling of the House. It reasoned that Bond's right to dissent as a private citizen was limited by his decision to seek membership in the Georgia House. Moreover, the majority concluded, the SNCC statement and Bond's related remarks went beyond criticism of national policy and provided a rational basis for a conclusion that the speaker could not in good faith take an oath to support the State and Federal Constitutions:

> "A citizen would not violate his oath by objecting to or criticizing this policy or even by calling it deceptive and false as the statement did.
>
> "But the statement does not stop with this. It is a call to action based on race; a call alien to the concept of the pluralistic society which makes this nation. It aligns the organization with '. . . colored people in such other countries as the Dominican Republic, the Congo, South Africa, Rhodesia . . . .' It refers to its involvement in the black people's struggle for liberation and self-determination. . . .' It states that 'Vietnamese are murdered because the United States is pursuing an aggressive policy in violation of international law.' It alleges that Negroes, referring to American servicemen, are called on to stifle the liberation of Viet Nam.
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> "The call to action, and this is what we find to be a rational basis for the decision which denied Mr. Bond his seat, is that language which states that SNCC supports those men in this country who are unwilling to respond to a military draft." [2]

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[2] *Id.*, at 344.

Chief Judge Tuttle dissented.[3] He reasoned that the question of the power of the Georgia House under the State Constitution to disqualify a Representative under these circumstances had never been decided by the state courts, and that federal courts should construe state law, if possible, so as to avoid unnecessary federal constitutional issues. Since Bond satisfied all the stated qualifications in the State Constitution, Chief Judge Tuttle concluded that his disqualification was beyond the power of the House as a matter of state constitutional law.

Bond appealed directly to this Court from the decision of the District Court under 28 U. S. C. § 1253. While this appeal was pending, the Governor of Georgia called a special election to fill the vacancy caused by Bond's exclusion. Bond entered this election and won overwhelmingly. The House was in recess, but the Rules Committee held a hearing in which Bond declined to recant his earlier statements. Consequently, he was again prevented from taking the oath of office, and the seat has remained vacant. Bond again sought the seat from the 136th District in the regular 1966 election, and he won the Democratic primary in September 1966, and won an overwhelming majority in the election of November 8, 1966.[4]

The Georgia Constitution sets out a number of specific provisions dealing with the qualifications and eligibility of state legislators. These provide that Representatives shall be citizens of the United States, at least 21 years

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[3] *Id.*, at 345.

[4] A question was raised in oral argument as to whether this case might not be moot since the session of the House which excluded Bond was no longer in existence. The State has not pressed this argument, and it could not do so, because the State has stipulated that if Bond succeeds on this appeal he will receive back salary for the term from which he was excluded.

of age, citizens of Georgia for two years, and residents for one year of the counties from which elected.[6] The Georgia Constitution further provides that no one convicted of treason against the State, or of any crime of moral turpitude, or of a number of other enumerated crimes may hold any office in the State.[8] Idiots and insane persons are barred from office,[7] and no one holding any state or federal office is eligible for a seat in either house.[8] The State Constitution also provides:

> "Elections, returns, etc.; disorderly conduct.—Each House shall be the judge of the election, returns, and qualifications of its members and shall have power to punish them for disorderly behavior, or misconduct, by censure, fine, imprisonment, or expulsion, but no member shall be expelled, except by a vote of two-thirds of the House to which he belongs."[9]

These constitute the only stated qualifications for membership in the Georgia Legislature and the State concedes that Bond meets all of them. The Georgia Constitution also requires Representatives to take an oath stated in the Constitution:

> "*Oath of members.*—Each senator and Representative, before taking his seat, shall take the following oath, or affirmation, to-wit: 'I will support the Constitution of this State and of the United States, and on all questions and measures which may come before me, I will so conduct myself, as will, in my judgment, be most conducive to the interests and prosperity of this State.' "[10]

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[6] Georgia Const., Art. 3, § 6 (§ 2-1801, Ga. Code Ann.).
[8] Georgia Const., Art. 2, § 2 (§ 2-801, Ga. Code Ann.).
[7] *Ibid.*
[8] Georgia Const., Art. 3, § 4 (§ 2-1606, Ga. Code Ann.).
[9] Georgia Const., Art. 3, § 7 (§ 2-1901 Ga. Code Ann.).
[10] Georgia Const., Art. 3, § 4 (§ 2-1605 Ga. Code Ann.).

The State points out in its brief that the latter part of this oath, involving the admonition to act in the best interests of the State, was not the standard by which Bond was judged.

The State does not claim that Bond refused to take the oath to support the Federal Constitution, a requirement imposed on state legislators by Art. VI, cl. 3, of the United States Constitution:

> "The Senators and Representatives before mentioned, and the Member of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Tests shall ever be required as a Qualification to any Office or public Trust under the United States."

Instead, it argues that the oath provisions of the State and Federal Constitutions constitute an additional qualification. Because under state law the legislature has exclusive jurisdiction to determine whether an elected Representative meets the enumerated qualifications, it is argued that the legislature has power to look beyond the plain meaning of the oath provisions which merely require that the oaths be taken. This additional power is said to extend to determining whether a given Representative may take the oath with sincerity. The State does not claim that it should be completely free of judicial review whenever it disqualifies an elected Representative; it admits that, if a State Legislature excluded a legislator on racial or other clearly unconstitutional grounds, the federal (or state) judiciary would be justified in testing the exclusion by federal constitutional standards.[11] But the State argues that there can be no

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[11] See *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960), in which the Court stated: "When a State exercises power wholly within the

doubt as to the constitutionality of the qualification involved in this case because it is one imposed on the State Legislatures by Article VI of the United States Constitution. Moreover, the State contends that no decision of this Court suggests that a State may not ensure the loyalty of its public servants by making the taking of an oath a qualification of office. Thus the State argues that there should be no judicial review of the legislature's power to judge whether a prospective member may conscientiously take the oath required by the State and Federal Constitutions.

We are not persuaded by the State's attempt to distinguish, for purposes of our jurisdiction, between an exclusion alleged to be on racial grounds and one alleged to violate the First Amendment. The basis for the argued distinction is that, in this case, Bond's disqualification was grounded on a constitutional standard—the requirement of taking an oath to support the Constitution. But Bond's contention is that this standard was utilized to infringe his First Amendment rights, and we cannot distinguish, for purposes of our assumption of jurisdiction, between a disqualification under an unconstitutional standard and a disqualification which, although under color of a proper standard, is alleged to violate the First Amendment.

We conclude as did the entire court below that this Court has jurisdiction to review the question of whether the action of the Georgia House of Representatives deprived Bond of federal constitutional rights, and we now move to the central question posed in the case—whether Bond's disqualification because of his statements violated the free speech provisions of the First Amendment as applied to the States through the Fourteenth Amendment.

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domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right." 364 U. S., at 347.

The State argues that the exclusion does not violate the First Amendment because the State has a right, under Article VI of the United States Constitution, to insist on loyalty to the Constitution as a condition of office. A legislator of course can be required to swear to support the Constitution of the United States as a condition of holding office, but that is not the issue in this case, as the record is uncontradicted that Bond has repeatedly expressed his willingness to swear to the oaths provided for in the State and Federal Constitutions. Nor is this a case where a legislator swears to an oath *pro forma* while declaring or manifesting his disagreement with or indifference to the oath. Thus, we do not quarrel with the State's contention that the oath provisions of the United States and Georgia Constitutions do not violate the First Amendment. But this requirement does not authorize a majority of state legislators to test the sincerity with which another duly elected legislator can swear to uphold the Constitution. Such a power could be utilized to restrict the right of legislators to dissent from national or state policy or that of a majority of their colleagues under the guise of judging their loyalty to the Constitution. Certainly there can be no question but that the First Amendment protects expressions in opposition to national foreign policy in Vietnam and to the Selective Service system. The State does not contend otherwise. But it argues that Bond went beyond expressions of opposition, and counseled violations of the Selective Service laws, and that advocating violation of federal law demonstrates a lack of support for the Constitution. The State declines to argue that Bond's statements would violate any law if made by a private citizen, but it does argue that even though such a citizen might be protected by his First Amendment rights, the State may nonetheless apply a stricter standard to its legislators. We do not agree.

Bond could not have been constitutionally convicted under 50 U. S. C. § 462 (a), which punishes any person who "counsels, aids, or abets another to refuse or evade registration." [12] Bond's statements were at worst unclear on the question of the means to be adopted to avoid the draft. While the SNCC statements said "We are in sympathy with, and support, the men in this country who are unwilling to respond to a military draft," this statement alone cannot be interpreted as a call to unlawful refusal to be drafted. Moreover, Bond's supplementary statements tend to resolve the opaqueness in favor of legal alternatives to the draft, and there is no evidence to the contrary. On the day the statement was issued, Bond explained that he endorsed it "because I like to think of myself as a pacifist and one who opposes that war and any other war and eager and anxious to encourage people not to participate in it for any reason

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[12] The pertinent provisions of § 462 (a) are as follows:

"[A]ny person who shall knowingly make, or be a party to the making, of any false statement or certificate regarding or bearing upon a classification or in support of any request for a particular classification, for service under the provisions of this title . . . , or rules, regulations, or directions made pursuant thereto, or who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title . . . , or who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title . . . , or of said rules, regulations, or directions, . . . or any person or persons who shall knowingly hinder or interfere or attempt to do so in any way, by force or violence or otherwise, with the administration of this title . . . , or the rules or regulations made pursuant thereto, or who conspires to commit any one or more of such offenses, shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or both such fine and imprisonment . . . ."

that they choose." In the same interview, Bond stated categorically that he did not oppose the Vietnam policy because he favored the Communists; that he was a loyal American citizen and supported the Constitution of the United States. He further stated "I oppose the Viet Cong fighting in Viet Nam as much as I oppose the United States fighting in Viet Nam." At the hearing before the Special Committee of the Georgia House, when asked his position on persons who burned their draft cards, Bond replied that he admired the courage of persons who "feel strongly enough about their convictions to take an action like that knowing the consequences that they will face." When pressed as to whether his admiration was based on the violation of federal law, Bond stated:

> "I have never suggested or counseled or advocated that any one other person burn their draft card. In fact, I have mine in my pocket and will produce it if you wish. I do not advocate that people should break laws. What I simply try to say was that I admired the courage of someone who could act on his convictions knowing that he faces pretty stiff consequences."

Certainly this clarification does not demonstrate any incitement to violation of law. No useful purpose would be served by discussing the many decisions of this Court which establish that Bond could not have been convicted for these statements consistently with the First Amendment. See, *e. g.*, *Wood* v. *Georgia*, 370 U. S. 375 (1962); *Yates* v. *United States*, 354 U. S. 298 (1957); *Terminiello* v. *Chicago*, 337 U. S. 1 (1949). Nor does the fact that the District Court found the SNCC statement to have racial overtones constitute a reason for holding it outside the protection of the First Amendment. In fact

the State concedes that there is no issue of race in the case.

The State attempts to circumvent the protection the First Amendment would afford to these statements if made by a private citizen by arguing that a State is constitutionally justified in exacting a higher standard of *loyalty* from its legislators than from its citizens. Of course, a State may constitutionally require an oath to support the Constitution from its legislators which it does not require of its private citizens. But this difference in treatment does not support the exclusion of Bond, for while the State has an interest in requiring its legislators to swear to a belief in constitutional processes of government, surely the oath gives it no interest in limiting its legislators' capacity to discuss their views of local or national policy.[13] The manifest function of

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[13] Madison and Hamilton anticipated the oppressive effect on freedom of expression which would result if the legislature could utilize its power of judging qualifications to pass judgment on a legislator's political views. At the Constitutional Convention of 1787, Madison opposed a proposal to give to Congress power to establish qualifications in general. Warren, The Making of the Constitution (1928), 420–422. The Journal of the Federal Convention of 1787 states:

"Mr. Madison was opposed to the Section as vesting an improper and dangerous power in the Legislature. The qualifications of electors and elected were fundamental articles in a Republican Govt. and ought to be fixed by the Constitution. If the Legislature could regulate those of either, it can by degrees subvert the Constitution. . . . Qualifications founded on artificial distinction may be devised, by the stronger in order to keep out partizans of a weaker faction.

. . . . . .

"Mr. Madison observed that the British Parliament possessed the power of regulating the qualifications both of the electors, and the elected; and the abuse they had made of it was a lesson worthy of our attention. They had made the changes in both cases subservient to their own views, or to the views of political or Religious

the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy. The central commitment of the First Amendment, as summarized in the opinion of the Court in *New York Times* v. *Sullivan*, 376 U. S. 254, 270 (1964), is that "debate on public issues should be uninhibited, robust, and wide-open." We think the rationale of the *New York Times* case disposes of the claim that Bond's statements fell outside the range of constitutional protection. Just as erroneous statements must be protected to give freedom of expression the breathing space it needs to survive, so statements criticizing public policy and the implementation of it must be similarly protected. The State argues that the *New York Times* principle should not be extended to statements by a legislator because the policy of encouraging free debate about governmental operations only applies to the citizen-critic of his government. We find no support for this distinction in the *New York Times* case or in any other decision of this Court. The interest of the public in hearing all sides of a public issue is hardly advanced by extending more protection to citizen-critics than to legislators. Legislators have an obligation to take positions on controversial political questions so that their constituents can be fully informed by them, and be better able to assess their qualifications for office; also so they may be represented in governmental debates by the person they have elected to represent them. We therefore hold that the disqualification of Bond from

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parties." 2 Farrand, The Records in the Federal Convention of 1787 (Aug. 10, 1787), pp. 249–250.

Hamilton agreed with Madison that:

"The qualifications of the persons who may choose or be chosen . . . are defined and fixed by the constitution; and are unalterable by the legislature." The Federalist, No. 60 (Cooke ed. 1961), 409.

membership in the Georgia House because of his statements violated Bond's right of free expression under the First Amendment. Because of our disposition of the case on First Amendment grounds, we need not decide the other issues advanced by Bond and the *amici*.[14]

The decision of the District Court is

Reversed.

[14] Bond argues that the action of the Georgia House was not authorized by state law, that if the State Constitution allows this exclusion it does so pursuant to an oath which is unconstitutionally vague, that the exclusion was based on statements protected by the First Amendment, and that the exclusion is a bill of attainder and an *ex post facto* law. In addition, *amicus* briefs filed in support of the appellant add the arguments that the decision not to seat Bond was inextricably involved with race prejudice and that it violated the guarantee of a republican form of government clause.

Similarly, we need not pass on the standing of two of Bond's constituents who joined in the suit below. The majority below dismissed the complaint as to these two constitutents because they lacked a sufficiently direct interest in the controversy as would give them standing. The majority noted that it was appropriate to dismiss the case as to Bond's constituents because Bond's complaint would resolve every issue necessary to a decision in the case. We express no opinion on the question of whether Bond's constituents can claim that concrete adverseness which would be necessary to give them standing.